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REPORTS H. B.
OF
APPELLATE COURT

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND
CASES CITED AND STATUTES CITED AND
CONSTRUED AND AN INDEX.

BY SIDNEY R. MOON,
OFFICIAL REPORTER.

DANIEL W. CROCKETT, First Asst. Reporter.

LEE W. MOON, Second Asst. Reporter.

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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
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OF THE
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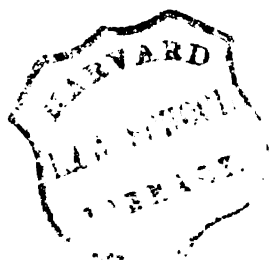


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C A S E S
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA;

DES MOINES, JUNE TERM, A. D. 1862.

IN THE SEVENTEENTH YEAR OF THE STATE

PRESENT:

HON. CALEB BALDWIN, CHIEF JUSTICE.
" GEORGE G. WRIGHT, } JUDGES.
" RALPH P. LOWE, }

GATES v. REYNOLDS.

1. DAMAGES FOR FALSE REPRESENTATIONS: RESCISSION OF CONTRACT. The purchaser of real estate cannot, in an action against the vendor, recover as damages, for false and fraudulent representations made by such vendor in the contract of sale, the amount of the money value of the consideration received by such vendor, when it is not shown that the plaintiff has offered to rescind the contract by placing the parties in *status quo*.
2. SAME. In an action for false representations in the sale of land, if the contract has not been rescinded, or the plaintiff has not offered to rescind, the measure of damages is the difference between the actual value of the land purchased and its value as it was represented by the vendor.

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3. FALSE REPRESENTATIONS. To entitle the purchaser of real estate to recover for false representations made by the vendor, in the contract of sale, it must be made to appear that they were made with a knowledge that they were false; following *Holmes v. Clarke*, 10 Iowa, 433.
4. ATTACHMENT. In an action for false representations, the damages being unliquidated, an attachment should not be issued until the requirements of § 1851 of the Code of 1851, have been complied with.

Appeal from Allamakee District Court.

MONDAY, APRIL 15, 1861.¹

THE facts are stated in the opinion of the court.

Grosby and Hatch for the appellants.

Contracts vitiated by fraud are voidable, and not void. The injured party may annul or enforce the contract, as the peculiar circumstances of the case may require. 1 Smith's L. C. 276. An election to rescind or affirm must be made promptly on the discovery of the fraud. Id. 276; 2 Pars. Cont. 278. A rescission can be effected only by placing the parties in *statu quo* or by an offer to do so. *Mattewan Company v. Bentley*, 13 Barb. 641; *Wheaton et al. v. Baker*, 14 Id. 594; *Masson v. Bovet*, 1 Denio, 69; *Baker v. Robins*, 2 Id. 136; 1 Hill. Vendors, 33. The purchaser cannot recover in an action at law the value of the consideration which he has parted with, unless he shows the fraud and the rescission of the contract. *Likes v. Baer*, 8 Iowa, 368; *Whitney v. Allaire*, 1 Hill, 484; 4 Denio, 554; 1 Com. 305.

The jury should have been instructed that the representations must have been made by the defendant with the knowledge that they were false, to entitle plaintiff to recover. *Holmes v. Clark*, 10 Iowa, 423.

The attachment should have been quashed, because the petition was not presented to any court or judge for allow-

¹ The report of this case has been delayed by the pendency of a petition for a rehearing, which was considered and overruled after the publication of the 12th Iowa Reports.

ance thereon of the amount in value of the property to be attached. Code of 1851, § 1851.

John T. Clark and *Reuben Noble*, for the appellee.

The plaintiff could not receive the Iowa lands after a discovery of the fraud, and then bring an action for the difference between their actual value and their value as they were represented by the defendant. He would be estopped by such act from claiming damages. The principle of the rescission of contracts has no application to this case. 2 Pars. Cont. 277; *Martin v. Roberts*, 5 Cush. 126; *Pierce v. Wood*, 3 Foster, 525; 15 Ohio, 200.

BALDWIN, J.—The plaintiff sold to defendant a farm in the state of Indiana, at the rate of forty dollars per acre, and, in consideration thereof, the defendant agreed to pay off incumbrances upon the land by him purchased to the amount of \$3,000, and for the balance of the purchase money agreed to convey to plaintiff Iowa lands, at the rate of ten dollars per acre.

The plaintiff, in his petition, sets out a copy of the bond given to him by defendant, which sets forth the contract as above stated, and claims that the Iowa lands were not what the defendant represented them to be, and that by means of the false and fraudulent representations made by defendant at the time the contract was made, that he had been damaged to the amount of \$10,000, for the recovery of which this suit is brought.

The defendant denies the fraud, and alleges that he has paid off the incumbrances to the amount of \$3,000, on the land purchased of plaintiff, as he had agreed to, and is ready to perform his contract, and that plaintiff is not entitled to recover.

Upon trial, the court, after having fully and correctly directed the jury as to what constituted fraud, upon the question of damages charged them as follows :

"If the plaintiff is entitled to recover, he is entitled to recover the money value of the consideration received by the defendant, and the money value of the consideration at the time the defendant received it, and interest at six per cent. on the said value to the present time."

To this instruction the defendant excepted, and the giving thereof is the first error assigned.

It does not appear that plaintiff had offered to rescind the contract by placing the defendant in the same position he was in before the contract was made, which we think he would have to do before he "could recover the money value consideration received by the defendant." The defendant had partially performed his contract by paying off incumbrances to the amount of \$3,000, which was a debt due by plaintiff, and was ready to fulfill his contract by executing a deed for the Iowa lands. Under this instruction the jury could have found for plaintiff the money value of the farm purchased by defendant, without an offer upon the part of plaintiff to rescind or to pay back the money advanced for him by defendant.

The claim of plaintiff is for damages sustained by reason of the false representations of defendant as to the quality of the Iowa lands. The rule of damages, as given by the District Court, would more aptly apply, had the plaintiff placed himself in a position to rescind the whole contract. Having failed to do this, the true measure of damages, under the pleadings, would be the difference between the land purchased by plaintiff at the date of the contract, and the amount the land would have been worth at that time, had it been such as it was represented to be by the defendant. *Hahn v. Cummings*, 3 Iowa, 583; *Likes v. Baer*, 8 Id. 369.

The court also refused to instruct the jury that the defendant was not liable unless he knew the representations he made were false. Under the rule as laid down by this

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court, in the case of *Holmes v. Clark*, 10 Iowa, 433, this instruction should have been given.

The court also erred in refusing to dissolve the attachment, upon the motion of defendant. The claim of plaintiff was not founded upon a written contract. The damages being unliquidated, an attachment should not have been issued until the requirements of section 1851 of the Code had been complied with.

Judgment reversed.

REED V. REED.

- 1 RECEIPT BY BAILEE. The bailee of personal property is, by his receipt executed to the bailor, binding himself to account for the same to such bailor, estopped from denying the right of the bailor to the possession.
2. DEFENCE IN REPLEVIN. A defendant in replevin cannot defeat the action of the plaintiff by showing title in a third person not a party to the action. WRIGHT, J., dissenting.

Appeal from Johnson District Court.

SATURDAY, DECEMBER 21, 1861.¹

THE facts are fully stated in the opinion of the court.

Clark & Bro. for the appellant.

I. Testimony of a cotemporaneous parol agreement between defendant and Joseph Lambrite was inadmissible to change the legal character of the instrument made by the defendant to plaintiff. *Thompson v. Ketchum*, 8 John. 189; *Woodbridge v. Spooner*, 3 Barn. & Ald. 233; *Sands v. Wood*, 1 Iowa, 263; *Rawson v. Walker et al.*, 1 Stark. 361; *Mosely v. Hanford*, 10 Barn. & Cress. 729; *Myers v.*

¹The report of this case did not appear in the 12th volume of Iowa Reports, for the reason that a petition for rehearing, filed by the counsel for the appellant, was pending when that volume was published.

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Sunderland, 4 G. Greene, 569; *Smith v. Brown*, 3 Hawks, 580; *May v. Babcock et al.*, 4 Ohio, 334; 1 Phil. Ev., Cow., Hill & Edwards' Notes, 476; *Walker & Bros. v. Manning, Commissioner*, 6 Iowa, 519.

II. The defendant could not deny the title of the plaintiff under this instrument, executed by him to the plaintiff; neither could he show title in a third person to defeat the right of the plaintiff to the property. *Hawes et al. v. Watson et al.*, 2 Barn. & Cress. 340, (9 Eng. Com. 170); *Heenan v. Anderson*, 2 Compt. 243; *Stewart v. Duncan*, 2 Camp. 344; *Gosling v. Birnie*, 7 Bing. 339 (20 Eng. Com. L. R. 153); *Hall v. Griffin et al.*, 10 Id. 246 (Eng. Com. L. R. 118); *Dunlap's Paley's Agency*, 10, note *K*, and the authorities there cited; 24 Wend. 169.

Clarke & Davis, for the appellee, in the discussion of the first proposition in the argument for the appellant, cited Chit. Cont. 758; Story Cont. 1088; *Bowman v. Fox*, 3 Iowa, 571; *Ring v. Ashworth et al.*, Id. 452; *Williams v. Donaldson*, 8 Ib. 113 and 114: in the discussion of the second proposition, *Martin v. Ray*, 1 Blackf. 291; *Rogers v. Arnold*, 12 Wend. 30; *Harrison v. McIntosh*, 1 Johns. 380; *Shuter v. Page*, 11 Id., 196; *Ingraham v. Mead*, 1 Hill, 353; *Chambers v. Hunt*, 3 Harr. 339; *Anderson v. Talcott*, 1 Gilm. 365; *Seniocke v. Frederick*, 1 Smith, 64; *Scott v. Hughes*, 9 B. Mour. 104; *Moulton v. Bird*, 31 Mo. 296; *Edwards v. McCurdy*, 13 Ills. 122; *Patteson v. Adams*, Hill & Denio, 426.

BALDWIN, C. J.—The plaintiff, upon the trial, to support his right to the possession of the property obtained by the writ of replevin issued in this cause, introduced in evidence the following receipt, which the defendant admitted was signed by him, to wit: "Received, Iowa City, October 26th, 1858, from Julius A. Reed, Treasurer of the Iowa College, the following described notes and accounts and

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personal property, to collect or sell the same, as may best secure the payment thereof, or otherwise as said Julius A. Reed, Treasurer, may from time to time direct, and account to him, the said Julius A. Reed, Treasurer, when called for." A list of notes and accounts and other personal property is given in said receipt, and signed by the defendant.

The plaintiff after the introduction of this receipt, and evidence proving a demand, submitted the case to the jury.

The defendant was then introduced as a witness, and testified that the said written instrument read in evidence, was executed by defendant at the urgent request of one Lambrite, a member of the firm of Burell, Gillett & Co. That the plaintiff, Julius A. Reed, was not present at the time when said receipt was signed, that when it was signed it was given to said Lambrite under an express understanding that the same was not to be delivered to the plaintiff until one James K. Mills of Davenport, of whom the defendant was the agent, and for whom he held said property, should receive his pay, being the sum of \$1,300; that the said Lambrite delivered said writing to the plaintiff in violation of said express agreement; that the said Mills had not yet been paid; that the defendant was only to account to plaintiff for the property after said Mills had been first paid and satisfied out of it; that the plaintiff was, at the time of giving said receipt, the Treasurer of Iowa College, and had succeeded the said Lambrite, who was a defaulter, and indebted to the said College to the amount of about \$7,000 and had asked defendant to give such receipt. Defendant further testified that, at the time of making said receipt, he was the agent of said Mills, and held the property in controversy for said Mills as his agent at the time suit was brought, that he had no authority from said Mills to execute and deliver to the plaintiff any absolute receipt for said goods, nor to give the receipt offered

in evidence, and that Mills was still the owner of the said property at the time suit was brought. This testimony was given to the jury, notwithstanding the objections of plaintiff, to which ruling the plaintiff at the time excepted. The said witness further testified that the property in controversy had been sold by Burell, Gillett & Co., of Davenport, to James K. Mills, of Boston, and by him, through his agent, James K. Mills, of Davenport, to Reed & Downs, of which firm defendant was a member, and by said Reed & Downs to James K. Mills, of Davenport. The records of Johnson county were also introduced, showing such transfers.

The plaintiff relied upon the receipt of defendant, and proof of demand, as sufficient to show his right to the property.

The defendant denied the ownership of plaintiff in the property, and claimed that the said Mills was the owner, and that he, as the agent of Mills, was entitled to such possession.

The plaintiff asked, and the court refused to give to the jury, the following instructions, viz. :

"That by executing the instrument dated Oct. 28th, 1858, the defendant acknowledged the ownership of, and right of possession, on demand, to the property therein specified, in the plaintiff, and cannot in this action defeat the right of the plaintiff to the possession on demand of the property, by showing that James K. Mills was the owner of said property at the time said instrument was given by defendant."

"That by entering into the contract contained in said instrument, the defendant bound himself as a bailee under the plaintiff, and agreed to hold the property specified therein for the use of the plaintiff, the defendant cannot now show that at the time he signed said instrument that he, defendant, was the agent of Mills, and held the property as such agent."

The court, upon its own motion, among other instructions, directed the jury as follows :

"That the receipt introduced, without other evidence, entitles the plaintiff to the possession of the property as between the plaintiff and defendant, but if, at the time of the execution of the receipt, the property belonged to a third person, and the defendant had no authority, as agent of such third person or otherwise, to give such receipt, then the receipt conferred no such right on the plaintiff, and on such a state of facts he would not be entitled to the possession of the property."

The admission of parol testimony to explain or vary the terms of the written instrument offered in evidence, and the giving and refusing to give the instructions asked by plaintiff, are the errors assigned.

The court below, in its instructions, correctly stated that the receipt itself, without any other evidence, would entitle the plaintiff to recover. The defendant, by the execution and delivery of the receipt, admitted that the property belonged to the plaintiff, and that he held the same as his agent or bailee. The defendant, in his answer, fails to aver that there was any fraud or false representations made at the time the receipt was given, nor does he plead the contemporaneous contract that he seeks to establish by the evidence. The answer merely denies the ownership of plaintiff, and avers the right of possession to be in another. As between the plaintiff and defendant, there is no claim that defendant has the right to the possession in his own behalf, but claims that it is the property of Mills. Conceding that the rule is well settled in many of the states that the defendant in an action of replevin, may plead property in a stranger to the suit, and if such plea is supported by evidence, it is a good defense, yet is this rule applicable to this case, and will it apply under our statute?

Independent of the provisions of our statute, upon the

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strength of authorities we would feel disposed to follow this rule, at the same time distrusting its correctness as not founded on very accurate reasoning. "For the plaintiff," says NELSON, J., in *Rogers v. Arnold et al.*, 12 Wend. 30, "being in possession of the goods at the time of the caption, which is admitted by the plea, it is difficult to see how the defendant shows a right to the return of the property taken on the replevin by proving a title to it in a stranger."

Under the provisions of the Code in relation to the rights of third parties, and under other well settled maxims of the law, this rule does not apply in this case.

The defendant when he executed the receipt to plaintiff, admitted the rights of possession in the plaintiff, and in order to show that it was the property of a stranger, he now seeks to avoid the effect of his own obligation. Having by his own acts admitted certain rights to the plaintiff, he is thereafter estopped from denying what has been thus admitted. For it is truly said by Chief Justice TINDAL, in the case of *Gosling v. Binnie*, 7 Bing. 339 (20 Eng. Com. L. R. 153), where the defendant had orally agreed to hold certain timber for the plaintiff, "This is an action of trover, in which I agree that the question is, whether the plaintiff can show the property to be in himself, as to which, in the present case, the defendant is estopped by his own admissions; for unless they amount to an estoppel, the word estopped may as well be blotted out from the laws."

The defendant does not by his pleading, nor does the counsel claim by his argument, that the defendant in his own right is entitled to the possession of the property. It is claimed by him for Mills, a third party. Section 1999 of the Code provides, that if a third person claim the property he must be made a co-defendant. The object of the defendant by his seeking to avoid the force of his own

agreement, is to show a title in a third party. If this third party claimed the property under our statute, he should have been made a co-defendant. Had this been done, the rule discussed so fully by counsel, in reference to the effect of a cotemporaneous contract being made at the time the receipt was given, might have been applicable.

The court erred in refusing the instructions above set out, asked by plaintiff, as well as in giving the one referred to, upon its own motion.

Reversed.

WRIGHT, J., *dissenting*.—I think the foregoing opinion misconceives the true attitude of the parties, and the law applicable to them.

If plaintiff was not entitled to the possession of this property his action failed. And for this purpose it is immaterial whether the person so entitled was the defendant or a third person. (*Marienthal v. Shafer*, 6 Iowa, 223.) Plaintiff recovers upon the strength of his own right. If such right of possession is in a third person, it may be so shown without making him a party. The language of the statute is that such person may be made a party, and not that it is necessary to entitle the defendant to such defense. The statute, as to the defense, does not change the common law. The body and substance of this action lies still in the common law. (*Chadwick v. Miller*, 6 Id. 34.)

The defense being available, then, the doctrine of estoppel, in my opinion, has no application. If it has, then a factor, by doing that which he has no power to do, may estop his principal. Will this be claimed? Certainly not; and yet this is, in effect, the doctrine of the opinion of a majority of this court. In the case cited from 20 Eng. C. L. 153, the question was, whether the defendant was bound by admissions, made under the circumstances disclosed, and very different in their character from the one before us, as

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will be seen by a reference without recapitulating them. Certainly no case can be found holding the doctrine that if A sells B's property when he has no power, B is estopped thereby from claiming it. As between A and his vendee A may be estopped, but not B. The rule that a factor cannot pledge the goods of his principal has always been strictly adhered to.

In replevin brought to recover the property by the pledgee, can it not be shown that he had no power to make the contract? This will not be denied, certainly. It is a question of power to do the particular act, and this wanting, no rights arise to the pledgee under it. And the rule applies with much more force, where the sale is absolute.

If Mills had been made a party defendant, would it be claimed that he could not show a want of power in John Reed to execute the receipt? And if he could, and if John Reed may defeat plaintiff's action by showing the right of possession to be in a third person, upon what principle is it that he is estopped from showing what Mills might have shown? As to such a question, John Reed stands in the place of Mills.

I do not stop to discuss the question whether the instrument offered in evidence is of such a character as to estop the present defendant from showing the true nature of the transaction, independently of the rights of third persons. The views above suggested are decisive of the case, as I view it, and I need not discuss others. The judgment should be affirmed.

CULBERTSON & RENO v. LUCKEY *et al.*

1. PRESUMPTIONS OF FRAUD. A sale of real estate by a parent to a child, in contemplation of insolvency, for a consideration different from that expressed in the deed, the grantee not taking possession under the

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sale, and failing to file the deed for record for a considerable time after the execution thereof, may, from the nature of the transaction and the relation of the parties, be presumed fraudulent; but such presumption is not sufficiently strong to overcome a positive denial of fraud in a sworn answer.

2. **WEIGHT OF SWORN ANSWER IN CHANCERY.** An answer in chancery under oath, in response to a petition demanding a verified answer, is equal in weight to the evidence of a disinterested witness.
3. **CONSIDERATION: FRAUD.** The fact that the consideration named in a deed is greater than that actually paid, is of itself insufficient to set aside a sale as fraudulent.

Appeal from Washington District Court.

TUESDAY, APRIL 8.

CREDITORS' BILL. The facts are fully stated in the opinion of the court.

J. F. McJunkin, for the appellant, argued:

I. That evidence sufficient to overcome the sworn statements in the answers should be equal to the evidence of two witnesses, citing 2 Story Eq. Jur. § 1528; 3 Greenl. E. § 287, and the authorities there referred to. *The State of Iowa, ex rel. The Attorney General, v. Tilyhman*, 6 Iowa, 496; *Davis v. Stevens*, 3 Iowa, 158; *Waldron v. Zollicoffer*, 3 Iowa, 108; *Pierce v. Wilson et al.*, 2 Id. 20; *Chuevette v. Mason*, 4 G. Greenc, 231; *Clark v. Langworthy*, 3 Iowa, 563.

II. That when a cause is submitted on bill and answer, the answer will be considered as true. *Childs v. Horr*, 1 Iowa, 432; *Westfall et ux. v. Lee et al.*, 7 Id. 12.

III. That the answer in this case shows that the conveyance which complainant seeks to set aside was made in good faith by both the grantor and grantee; that it was for a good and valuable consideration; and at the time of such sale, the respondent Luckey had other property from which complainants' claim could have been made.

Clark & Bro., for the appellees, contended:

I. That the execution and return of *nulla bona* thereon

is conclusive evidence that the defendant had not sufficient property from which the claim of complainants could be made. *Postlewait et al. v. Howes et al.*, 3 Iowa, 383.

II. That defendant was ignorant of complainants' claim when she received the conveyance from her father, can make no difference if she is not a *bona fide* purchaser.

III. The formal denial of fraud in the answers of the defendants is unavailing when such answers admit facts, or fail to deny facts alleged by the bill, which render the transaction legally or constructively fraudulent. *Hawley v. Kramer*, 4 Conn. 717; *Manice v. New York Dry Dock Company*, 3 Edwards' Ch. 113; *Fellows v. Fellows*, 4 Conn. 682; *Wheat v. Moss*, 16 Ark. 243; *Morris et al. v. Blair*, 1 Stock. (N. J.) 535; *Wright v. Prescott*, 2 Barb. S. C. 696.

IV. These answers are evidence for defendant only "upon every matter stated in the bill, and responsive to it." *The State of Iowa v. Tilghman*, 6 Iowa, 500.

V. When a vendee claims to have taken land in payment of an antecedent debt of the vendor, he must prove as against the existing creditors of the vendor, the existence of the debt. *McCoskle v. Amarine*, 12 Ala. 17; *Clark v. Dupew*, 25 Penn. (1 Casey) 509.

VI. A deed purporting to have been made on a moneyed consideration, cannot, when attacked as fraudulent against the creditors of the grantor, be propped up by proof of an antecedent indebtedness to the grantee, such consideration being inconsistent with that expressed on the face of the deed. *Bullitt v. Worthington*, 3 Md. Ch. Dec. 99, and *Glenn v. Randall*, 2 Id. 220.

BALDWIN, C. J.—The complainants obtained a judgment against the defendant Luckey, upon which an execution issued, and a return of no property was made. They now seek to set aside a conveyance made by the said Luckey to the defendant, Hetta J. Mitchell, which was executed and recorded prior to the date of complainants' judgment,

and ask for an order of court subjecting the property thus conveyed to its payment.

The allegations in the bill, are, substantially, that the defendant Luckey made the said conveyance in contemplation of insolvency, and for the purpose of avoiding the payment of the plaintiffs' claim; that it was executed and delivered without consideration; that the grantee was the daughter of Luckey; and that it was understood when such conveyance was made, both by the grantor and grantee, that the property was to be reconveyed to the father when he might so desire. The deed bears date July the 29th, 1858, and was filed for record on the 15th day of December following. The proceedings against Luckey, in which the plaintiffs obtained said judgment, were commenced in Louisa county on the 23d day of November, 1858, and the judgment rendered at the April term following.

The complainants, in their bill, call upon the defendants to respond to certain interrogatories therein propounded. To these, the defendants reply in substance, that the said Luckey and Hetta sustain toward each other the relation of parent and child. They each deny the allegation of fraud, or any intention to defeat the complainants in the collection of their debt. They deny that the conveyance was pretended, or that there was any understanding or agreement that the said Hetta was to reconvey, or that the said lands were held by her in secret for the use and benefit of her father. The said Hetta avers that she paid to her father the sum of \$250 in consideration of such conveyance, and that at the time of such conveyance she knew nothing of the indebtedness of her father to the complainants, that she bought the said property in good faith, and for a valuable consideration. The judgment of complainant and the deed by Luckey, were the only evidence introduced to controvert these answers. A decree

being rendered in favor of complainant, respondents appeal.

It is maintained by the counsel for appellees that the circumstances attending this sale are sufficient to raise such presumptions of fraud as to overcome the answers of respondents. The evidences of fraud as thus relied on, consist in the sale of the land by a parent to a child, the time when made, the amount of the consideration paid—it being less than that named in the deed—the vendee not taking possession under the sale, the mortgage upon other lands of Luckey to other relatives, the failing to file the deed to the said Hetta for such a length of time after the execution thereof. Each of these circumstances are sufficient to raise presumptions of fraud, and “fraud may be presumed from the nature of the transaction and the relation of the parties.” Sales by a parent to a child, made in contemplation of insolvency, are to be regarded as evidences of fraud. But after giving due consideration to these suggestions of counsel, we are of the opinion that they are not sufficient to overcome the effect of defendant’s answer. Where fraud is denied, it must be satisfactorily established by proof. *Waldron v. Zollkoffer*, 3 Iowa, 108. The rule is well settled, that when the allegations of the bill are denied by the answer of the respondent, the bill should be dismissed, unless it is well supported by evidence. In 3 Greenl. Ev. § 289, it is said, that “an answer which is responsive to the allegations and charges made in the bill, and contains clear and positive denials thereof, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and other attendant circumstances which supply the want of another witness, and thus destroy the statements of the answer, or demonstrate its incredibility or insufficiency as evidence.” See cases there cited, and also by the counsel for appellant.

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It has also been held by this court, that §§ 1744-5-6-7, apply to chancery, as well as to proceedings at law. See *Shepard v. Ford*, 10 Iowa, 502. Under these sections, the complainants could call upon the respondents for an answer under oath, but when made it is to be considered as evidence of equal weight of that of a disinterested witness. The answer of the respondent, Hetta J. Mitchell, if taken as true, or as possessing the same weight as that of a disinterested witness, and being uncontroverted except by the mere presumptions of fraud attending the sale as above stated, we readily conclude that the decree of the court was erroneous.

The fact that the consideration named in the deed is greater than that actually paid, is of itself insufficient to set the sale aside.

The complainants having called upon the respondents to answer under oath, the allegations of the bill, must abide the effect of their answer, unless they can overcome the same by proper testimony.

The petition of complainants should have been dismissed.

Reversed.

BYINGTON v. WOODS *et al.*

1. PLEADINGS: PAYMENT OF TAXES: MOTION AND DEMURRER. A bill for the foreclosure of a tax title averred generally, that the plaintiff had paid all the taxes levied subsequent to the sale, for two years, and that said taxes amounted to a certain sum which was named: *Held*, That an objection to the bill could be properly presented by a motion for a more specific statement, but not by demurrer.
2. TAX TITLE: JOINDER OF CAUSES OF ACTION. Several distinct parcels of land, conveyed under a tax sale by different deeds, when they are the property of one, or of several joint owners, may be joined in one action to foreclose the tax title; but the petition should contain a distinct allegation as to each parcel, and show the amount for which a lien is claimed upon each one.

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Appeal from Johnson District Court.

TUESDAY, APRIL 8.

PETITION to foreclose a tax title upon certain real estate described as "all the town lots and blocks included within Woods' Addition to the city of Iowa city." The petition set out twenty-two deeds executed by the treasurer of Johnson county, conveying the property mentioned to the plaintiff pursuant to a sale made for taxes; and alleged that "William H. Woods, James Thompson and Patrick Smith were owners, and still are owners, of said real estate." To this petition the defendants demurred, for causes stated in the opinion of the court. The demurrer was sustained, and the plaintiff appeals.

*Le Grand Byington, pro se.**Edmonds & Ransom, for the appellee.*

BALDWIN, C. J.—The defendants in the court below assigned fourteen causes of demurrer to the plaintiff's petition, which demurrer was sustained, and plaintiff appeals. Upon what particular cause the court thus ruled, we are unable to determine. Many of the causes are frivolous, and others are not sufficiently specific.

As the counsel for the defendants has failed to point out to us the objections to the petition in argument, we will refer to but one or two, which it is most likely influenced the court in its ruling.

The ninth cause of demurrer is, that said petition does not show what the subsequent taxes for 1858 and 1859 were, (on said premises) alleged to have been paid by said plaintiff.

We do not think the demurrer should have been sustained for this cause. The plaintiff seeks a foreclosure of twenty-two different tax deeds. It is alleged in the peti-

tion, that the deeds were executed in pursuance of a tax sale made in the year 1858, for taxes previously due, upon the property then sold. It is alleged by the petitioner that he had paid the taxes for the years 1858 and 1859 on said lands sold to him, and under the provisions of the law it is claimed that the subsequent taxes thus paid by the purchaser at such sale is a lien for the amount so paid, and it is asked that it may be so declared. The averment in the petition is that the plaintiff had paid all the subsequent taxes levied for the years 1858 and 1859, amounting in all to \$300. The petitioner is entitled to a lien for taxes levied for the same purposes for which the property was sold, but not for all taxes that might be levied upon property,—such, for instance, as taxes for city purposes. The plaintiff, however, was entitled to recover upon the deeds, independent of the lien for taxes subsequently paid; and the objection of defendant could have been properly raised by a motion for a more specific statement, but not by demurrer.

The next and most important question presented by the demurrer is, that the plaintiff shows in his petition that he has joined many causes of action improperly therein, and seeks to foreclose equities in many distinct parcels of land, in the same suit, and against different persons, having distinct interests in distinct parcels of said lots. The allegation in the petition is, that at the time of the said sale and the delivery of the tax deeds, William H. Woods, James Thompson and Patrick Smith, were, and are still, the owners of said property. Edward Taylor and others are made parties, for the purpose of cutting off certain equities they claimed in said property, which plaintiff claims as subject to his tax lien. If Woods and others were the joint owners of the property, as is thus alleged, their interests are not distinct and separate as is claimed by the demurrer; and treating the tax deed as a mortgage, and the plaintiff's proceeding as a foreclosure, the other persons claiming equities

Byington v. Woods.

in the property sold were properly made parties to the foreclosure.

Is the petition subject to the objection "that the plaintiff has joined many causes of action improperly therein?" The complainant seeks to foreclose the equities of defendants in twenty-two different tracts of land, for which he holds as many tax deeds. The lots are all owned by the same parties, the taxes for which the lots were sold were assessed at the same time, the tax sale made and the deeds all executed the same day, by the same officer, and to the same purchaser. Section 1751 of the Code, in force when this action was commenced, provided that "several causes of actions may be united in the same petition, provided they affect all the parties thereto in the same capacities, and if suit on all might be brought in that county." Each conveyance of land by the treasurer gave to plaintiff a cause of action. When the title was to the same party, and the land owned by the same party, and the right of action had already accrued, we cannot see why the different causes may not be united. The object of this provision of the law was to save costs and harassing litigation, and if the same object can be attained by the union of several causes of action in one, it is certainly proper to unite them. It may be objected that if the judgment is for the aggregate of the taxes due on all the deeds, that the defendant cannot redeem a portion without redeeming the whole, or it may be said that subsequent purchasers or judgment creditors may be prejudiced in their rights to redeem a portion of the lands thus foreclosed. The petition may be defective in not setting forth fully the lien upon each tract, but we think that the several causes of action may be united, and this difficulty obviated by a distinct allegation in the petition in reference to each cause of action. In other words, let it be shown the amount due on each tract of land, and the liens thereon accrued by the subsequent payment of taxes,

Cook v. Woodbury County.

and let the foreclosure be made in the same way, that is, ordering a sale of each tract for the amount then due, with an order permitting a redemption before sale of any one tract by the payment of amount specified as due thereon.

The other points raised by the demurrer are not supported by the record.

We are of the opinion that the petition shows sufficient to entitle the plaintiff to recover. The statute provides that the tax deed is presumptive evidence of the regularity of all prior proceedings, and under this provision it is sufficient for the purchaser to declare upon the deed alone. If the sale has been irregular, it is the duty of the person who has been in default to show it.

Judgment reversed.

COOK *et al.* v. WOODBURY COUNTY.

1. **UNANSWERED PETITION IN EQUITY.** A petition in equity, when undenied, is taken as confessed, but the extent of such confession is frequently measured by the exhibits attached.
2. **SAME: EVIDENCE.** When proof is introduced which destroys the case made by a bill to which there is no answer relief should be denied.
3. **DUTY OF APPELLANT.** It is the duty of the appellant to bring before the Supreme Court all the evidence upon which the decree from which he appeals was rendered.

Appeal from Woodbury District Court.

TUESDAY, APRIL 8.

PETITIONERS seek to enjoin the collection of certain taxes for the years 1857, 1858 and 1859. The bill was filed on the 27th, and the cause decided on the 28th September, 1860. Whether an injunction was allowed in the first instance, and the decision found on the record made on the

final hearing, or on the application for the writ, does not appear. There was no answer, nor other pleadings than the petition. The cause was heard on the "bill and proof," and the injunction made perpetual as to a portion of the taxes for 1857 and 1858, and the other relief prayed for, refused. Complainants appeal.

James M. Ellwood for the appellant.

No appearance for the appellee.

WRIGHT, J. — There are insuperable obstacles which prevent the passing upon the many questions made by counsel. The bill refers to certain exhibits. These are not in the record. The cause was heard on petition and proof, but the proof is not here. It is true that some six months after the cause was decided, and after this appeal, the parties argued that certain evidence was introduced, and they set out what one witness testified; but they do not pretend that this was all the testimony. The clerk certifies that this is all the evidence found by him on the record, but it no where appears, by implication even, that all the proof presented to the court below is before us. Under such circumstances, we will not undertake to pass upon this decree.

It is true that a petition undenied is to be taken as confessed. But the extent and import of such confession is not unfrequently measured by the exhibits attached. These are not before us. Not only so, but where proof is introduced which destroys the case made by the bill, (though there be no answer,) relief should be denied. (*Adkins v. Faulkner*, 11 Iowa, 326.) Then, again, it is the duty of appellant to bring before us all the evidence upon which the decree was rendered. (*Garner v. Pomroy*, Id. 149, and cases there cited.)

Affirmed.

Byington v. Hampton.

BYINGTON V. HAMPTON *et al.*

1. **REDEMPTION: CITY TAXES.** The owner of real estate sold for taxes is not required to pay to the purchaser, in order to redeem, the subsequent taxes for city purposes paid thereon by such purchaser: following *Byington v. Rider*, 9 Iowa, 566.
2. **REPORT OF MASTER IN CHANCERY.** An order referring a chancery cause was as follows: "On motion and consent, this cause is referred to S. H. L., as commissioner, to examine and report his conclusions, under the rules of practice of this Court." *Held*, that the commissioner was not required to write out and report the evidence of each witness, in the language in which it was submitted; and that a statement of his conclusions drawn from the evidence was sufficient.
3. **REDEMPTION: ACCEPTANCE.** An acceptance by the purchaser of the amount paid by the owner of real estate sold for taxes, to the Treasurer for the purpose of redeeming the same, operates as a ratification of the act of the Treasurer in issuing a certificate of redemption.

13	23
87	167

Appeal from Johnson District Court.

TUESDAY, APRIL 8.

ACTION to foreclose a tax title. Defendants answered, admitting the tax sale, and alleging that the premises had been redeemed, on the 14th day of March, 1857, by one W. H. Woods, then claiming an interest therein, by the payment of taxes then due on said property, and by the payment to Thomas Hughes, the treasurer of Johnson County, the amount of taxes for which said land had been sold, the cost of such sale, and the interest which had accrued thereon, up to the time of redemption, which amounts were received by the plaintiff from the treasurer in full satisfaction of his lien upon said premises. To this there was a replication in denial. The other material facts are stated in the opinion of the court.

Le Grand Byington, pro se, argued, that school and road taxes, levied by authority of the State, and paid into the city treasury for convenience, were not within the scope of

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the ruling in *Byington v. Bookwalter*, 7 Iowa, 512; and *Byington v. Rider*, 9 Id. 566.

Clark & Bro., for the appellee, relied upon *Byington v. Rider*, 9 Iowa, 566.

BALDWIN, C. J. — I. Upon the authority of *Byington v. Rider*, 9 Iowa, 566, the defendant, in redeeming under a tax sale, was not required to refund money paid for subsequent taxes for city purposes.

II. The exceptions of plaintiff to the report of the Commissioner were properly overruled by the court. The order of reference is as follows: "On motion and consent, this cause is referred to T. H. Lee, as commissioner, to examine and report his conclusions, under the rules of practice of this court." It is objected that the commissioner does not report the testimony in full that was taken before him, but that there is a mere abstract of the same, that instead of its being written out and subscribed and sworn to by the witnesses, it appears in the form of a mere statement by the master of its import as he understands it. The report follows the order of the court, and in this respect it is sufficient.

III. We find, from a computation of the amount of taxes, interest and costs due upon the lots sold, that the defendant paid in a sufficient sum for the purpose of redemption, and that the report of the commissioner is not subject to the exception of plaintiff, upon this ground. Again, the complainant accepted of the amount of the redemption money paid in by the defendant, and by this act he ratified the act of the treasurer in issuing the certificate of redemption.

Affirmed.

Thrift v. Redman.

THRIFT V. REDMAN.

1. **SWORN PLEADINGS: SET-OFF.** A set-off is not a pleading within the meaning § 1745 of the Code of 1851, and when sworn to, even as an answer demanded under oath, has no weight as evidence.
2. **ERROR WITHOUT PREJUDICE.** The judgment of the court below will not be reversed because of an error in excluding evidence when such ruling did not result in prejudice to the appellant.
3. **CONVERSATION IN PRESENCE OF A JUROR.** When a witness, after he had testified and before the trial was concluded, had a conversation with several persons, in the presence of one of the jurors, in which he stated some material matters not elicited in the examination, which conversation occurred without any knowledge on the part of the witness of the presence of the juror; and the witness was recalled before the conclusion of the trial, and was interrogated as to the matters detailed in the conversation; it was held that the circumstances did not constitute sufficient ground for a new trial.
4. **GAMING.** Money lost in gaming and paid to the winner cannot be recovered back.

13	25
106	694
13	25
133	506
13	25
141	613

Appeal from Boone District Court.

TUESDAY, APRIL 8.

THIS was an action to recover an amount paid by plaintiff as surety for the defendant, upon a note executed by the parties, to one Ferdinand Grether. The other material facts are stated in the opinion of the court.

James M. Ellwood, for the appellant, contended:

1. That as the demurrer was to the whole answer, and as all but one count of the answer is admitted to be sufficient, it should be overruled. *Cochran v. Scott*, 3 Wend. 229; *Glover v. Tuck*, 24 Id. 153; *Chambers v. Lathrop*, Morris R. 102; *Sample v. Griffith*, 5 Iowa, 376; *The State of Iowa v. Foster*, 2 Iowa R. 559.
2. That the set-off was a part of defendant's pleading within the meaning of sec. 1745, Code of 1851, (see "Pleading" Bouvier's Law Dict.)
3. The court erred in excluding the evidence offered by the

defendant to show a set-off of moneys received by plaintiff of defendant as money won at gaming. Story Cont., sec. 565, and the cases cited; Code of 1851, section 2723. 4. The court erred in overruling the motion for a new trial.

Casady & Polk for the appellee.

I. The demurrer was not to the whole answer, but struck only at so much of the same as claimed to recover money lost at gaming. The whole answer is contained in one count, and the demurrer strikes only at a portion. The subsequent proceedings show that defendant had a trial on the other parts of his answer, and was not prejudiced by such ruling. Money lost at a game of cards cannot be recovered back. *Sipe & Finarty*, 6 Iowa, 394; *Marienthal et al. v. Shaeffer et al.*, Id. 223; *Davis v. Bronson*, Id. 410.

II. The court did not err in refusing to grant a new trial. *Cook & Owsley v. Walters*, 4 Iowa, 72.

WRIGHT, J.—I. Petition calls for a sworn answer. Defendant, after answering in denial, and various other matters, pleads a set-off, all of which was duly verified. On the trial, he claimed that “the allegation setting up the new matter by way of set-off,” being sworn to, must be received as evidence of equal weight with that of a disinterested witness. This position was overruled, and properly. A set-off is not a pleading, within the meaning of § 1745 of the Code. *Gilbert v. Mosier*, 11 Iowa, 498.

II. It is claimed that the court erred in excluding a portion of the answer to an interrogatory in the deposition of the witness Carroll. Upon principle, we are inclined to think that the ruling was erroneous. But if so, it was error without prejudice, and cannot therefore avail appellant. If it had been received, it could legitimately have had no possible weight with the jury. The witness refers to a note of \$100, manifestly another and different one

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from that involved in this controversy, which is for \$213.50, and the only one with which the jury had anything to do.

III. One Keeler was a witness in the cause. After he had testified, and before the trial was concluded, (during a recess of court,) he had a conversation with several persons, in which he stated some material matters, not elicited in his examination. One of the jurors was present, (but of this witness had no knowledge,) and heard the conversation, but took no part in it. Subsequently this witness was recalled for some purpose, and before leaving the stand was interrogated by this juror, as to the same matter detailed in the conversation, which the witness proceeded to state. There was no objection to this testimony at the time, but a motion for a new trial was made upon the ground, among others, that defendant was prejudiced by this out-door conversation in the presence of the juror. There was no error in the action of the court in overruling the motion. The matter stated by the witness was quite as favorable to defendant as plaintiff. Then there was no improper conduct on the part of the juror. And finally the whole matter was subsequently detailed in court, when both parties had ample opportunity to cross-examine and test the truth of the witness' statement.

IV. Defendant claims by way of set-off, the sum of \$1,095, for money lost by him and won by plaintiff on a game of cards. A demurrer to this part of the answer was sustained. Defendant now insists that the demurrer was improperly sustained; *first*, because it was to the whole answer, some parts of which are admitted to be good. We do not so understand the record. The demurrer was directed to this particular clause in the answer, and as to all the others defendant had a trial before the jury. But in the second place, it is insisted that the demurrer should have been overruled because defendant was entitled to re-

Long v. Burnett.

cover this money. We understand that the money had been actually paid over to the winner. If so, the rule, "*in pari delicto potior est conditio defendentis*" applies, and the money cannot be recovered back. Smith on Const., 171, n. 1; *McHatton v. Bates*, 4 Blackf. 63; *Danforth v. Evans*, 16 Vermont, 538; *Hickerson v. Benson*, 8 Mo. 8; *Allen v. Dodd*, 4 Humph. 131; *McAllister v. Hoffman*, 16 S. & B. 148; *Thomas v. Crorise*, 16 Ohio, 54; *Brown v. Ricker*, 4 John. 426; *McCullum v. Gourlay*, 8 Id. 147; *Houser v. Hancock*, 8 T. R. 575; *Godsall v. Bolden*, 2 Smith's L. Cas. 250, and note.

V. It is finally claimed that the judgment is excessive. And this point is well taken. Plaintiff claims for money paid for defendant upon a note, as his surety. He was entitled to six and not ten per cent interest on this, from the time of payment. It is manifest that he was allowed the higher rate. The judgment will be corrected, the excess (\$22.12) deducted, and plaintiff moving therefor, judgment entered in this court for the proper amount, appellee paying the costs of the appeal.

LONG *et al.* v. BURNETT.

1. SPECIAL ADMINISTRATOR. Under the Revised Laws of 1843, the powers of a special administrator were limited to the preservation of personal property of the decedent until a regular administrator could be appointed; and an order of the Probate Court directing the sale of real estate by a special administrator was without authority of law and was void. The regularity of such an order and the proceedings thereunder may be collaterally impeached.
2. JURISDICTION OF PROBATE COURT. The jurisdiction of a probate court over the settlement of the estate of a deceased person attaches and becomes effective only upon the granting of letters of administration; and the power to make an order directing the sale of real estate for the payment of debts, arises only upon the presentation, by the legal and regular administrator, of the petition prescribed by law.

18	28
83	527
18	28
113	79
13	28
129	744
129	745

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3. **SAME.** The presentation of such a petition by the administrator confers upon the court jurisdiction of the subject matter, and its subsequent proceedings will be presumed as regular and conclusive as those of courts of general jurisdiction. When the jurisdiction so far attaches as to require the court to hear and determine the sufficiency of the facts relied upon to confer such jurisdiction, whether they relate to the law, the process, the notice, or the petition, the action of the court will not be collaterally reviewed.
4. **EVIDENCE: TAX DEEDS.** Tax deeds regularly executed under the revenue law of 1841, are *prima facie* evidence of the regularity of all prior proceedings in the levy of the tax and the sale of the property; and when such deed is attacked the burden of showing a failure to comply with the requirements of the law, in such proceedings, is upon the party making such attack. When, however, no record of the levy of the tax, or of the sale, is in existence, the burden is upon the party claiming under the deed.
5. **RECITALS IN A DEED.** The failure to recite one of the requisites to a valid levy of a tax in a deed in which all the proceedings had in such levy and all others essential to its validity are set out, is evidence, by implication, that the requirement omitted was not complied with.
6. **CASE FOLLOWED.** *Rayburn v. Kuhl et al.*, 10 Iowa, 92, as to tax deed, cited.

Appeal from Cedar District Court.

TUESDAY, APRIL 8.

THE material facts are presented in the opinion of the court.

Grant & Smith for the appellants.

I. The plaintiff would, under the statute of 1843, (see Revision 1843, p. 713, § 35,) which was unrepealed and in full force when the administrator's deed was recorded, be debarred from contesting our title. The Code of 1851, sec. 1508, has no application to sales made before it took effect. *Cooper v. Sunderland*, 3 Iowa, 114.

II. The jurisdiction of a court of limited jurisdiction being once established, it is entitled to the same presumption in favor of its acts as a court of superior and general jurisdiction; and subsequent irregularities will not render

its proceedings void. *Little v. Sinnett*, 7 Iowa, 325; *Cooper v. Sunderland*, 3 Id. 125; *Morrow v. Weed*, 4 Id. 88; 1 Smith's L. C. (5th ed.) note 820, 848, and the authorities cited: *Lessee of Adams v. Jeffries*, 12 Ohio, 272; 2 Zab. 396; 1 Carter, 215; 1 Doug. 384; *Sheldon's Lessee v. Newton*, 3 Ohio S. 495; *Grignon's Lessees v. Astor et al.* 2 How. U. S. 319; 18 Ala. 176; 30 Maine, 97; 12 Conn. 491; 18 Id. 81; 11 S. & R. 422; Rev. Laws, 1843, p. 708, § 10.

III. It was for the court to decide upon the existence of facts which conferred jurisdiction, and its findings cannot be questioned in this collateral manner. *Grignon's Lessee v. Astor et al.*, 2 How. U. S. 342; *Thompson v. Tolmie*, 2 Peters, 165; *Voorhies v. The Bank of the United States*, 10 Id. 471; *Selim v. Snyder*, 7 S. & R. 166; *McPherson v. Cunliff*, 11 Id. 437; *Cowan v. The Turnpike Company*, 1 Conn. 1; *Gervis v. Brown*, 1 Nott & McCord, 329; *Scott v. Hancock*, 13 Mass. 162; *Moor v. White*, 6 John. Ch. 384; *Wyman v. Campbell*, 6 Porter, 219; *Lessee of Goforth v. Longworth*, 4 Ohio, 129.

IV. The tax list or warrant, and the papers necessary to and relating to the collection of the taxes for Cedar county for the years 1841 and 1842, should be produced, if in existence, as the best evidence. *Slade v. The Governor*, 3 Dev. 364; but if lost, the loss may be established, and parol evidence introduced to supply it. Black. Tax Tit. 598. It is true, as a general rule, *no presumption* can be raised in behalf of the officers to cure any radical defect in their proceedings; but it does not bind a third party who was not required to collect and preserve the necessary evidence. *Stead's Executors v. Course*, 4 Cranch, 408; *Colman v. Anderson*, 10 Mass. 105; *Gray v. Gardner*, 3 Mass. 399; Blackwell on Tax Titles, 613; *Freeman v. Thayer*, 33 Maine, 76; *Lessee of Ward v. Barrows*, 2 Ohio S. 241; 1 Greenl. Ev. 51; *Lessee of Winder v. Starling*, 7

Ohio, pt. 2, 190 (marg.) Acts done which presuppose the existence of others to make them legally operative, are presumptive proofs of the latter. *Bank of the United States v. Dandridge*, 12 Wheat. 70; *Williams v. East India Company*, 3 East, 192; *Kelly v. Connell*, 3 Dana, 532; *Wheelock v. Hall*, 3 N. H. 310; *Brown v. Connelly*, 5 Blackf. 390; *Hartwell v. Root*, 19 John. 345; *Jackson v. Shaffer*, 11 Id. 513.

Richman & Bro. for the appellee.

I. The duty of a special administrator consisted in collecting and preserving the personal estate for the administrator. He could not, under any circumstances, exercise control over the real estate. See Revised Stat. 1843, p. 677.

II. A petition must be presented by a regular administrator to confer upon the Probate Court jurisdiction. No presumptions arise in favor of the order of a court commanding a special administrator to do an unlawful thing. See the authorities cited to this point by appellant's counsel.

III. The absence of any record of the sale, and of evidence to show that any such records have ever been lost, not only destroys the *prima facie* character of the deed, but raises the presumption that the requirements of the law have not been complied with.

LOWE, J.—An action of right. On the trial before the court, the title and right of possession in the premises, were adjudged to be in plaintiffs. In seeking a revision of this judgment, the defendant insists that the court below committed an error in excluding from its consideration the evidence of his title to the land in controversy, consisting,

First. Of two deeds of conveyance, one from Benjamin S. Olds, special administrator, dated January 3d, 1846, to Amos E. Kimberly; the other from said Kimberly to the defendant, dated January 9th, 1850; both duly recorded,

Long v. Burnett.

and upon their face regularly executed. Their admissibility as evidence of title in the defendant, depends upon the question, whether the judge of probate, under the Revised Statutes of 1843, had the power and authority to license a special administrator to sell the land of a decedent to pay claims against the estate. The circumstances under which this had been done, are developed in the documentary and record evidence contained in the bill of exceptions accompanying the record in this case.

It seems that the plaintiffs are the devisees of Robert Long, who, in 1843, died seised in fee of the land in controversy, in the State of Ohio, making a will, but appointing no executor. Afterward, in 1844, the will was duly probated, and one Peter Igow, was appointed administrator, with the will annexed. Afterwards, Igow came to this state and applied to the judge of probate of Muscatine county for letters of administration, representing that there was personal property in said county belonging to the estate, and upon which the will operated. On account of some informality in the authentication of his papers, his application was refused.

But the judge of probate being advised that the property was in danger of being lost, unless it received immediate care, upon request appointed Benjamin S. Olds a special administrator, (as he had the power to do under the statute,) to take possession of and preserve the same, until a regular or general administrator could be appointed. To this extent were his duties as special administrator specified by his letters under which he was commissioned to act, and it is proper to remark, that the conditions of his bond were restricted to the same duties. Nevertheless, in November thereafter, (1845,) being unable to find or successfully to obtain any assets belonging to said estate, but having incurred certain expenses in attempting to do so, he petitioned the probate court to sell the land in controversy to

defray said expenses. The license was granted and the sale ordered, which took place on the 3d day of January, 1846. Amos E. Kimberly became the purchaser at \$201, to whom the said Olds made a deed of conveyance. This deed constitutes one of the sources of the defendant's title, having derived from Kimberly whatever title he had obtained by his purchase at the alleged administrator's sale.

The exclusion of these deeds on trial below by the court, is now pressed as matter of complaint. But we are not prepared to gainsay the correctness of this ruling. They were offered to prove title in the defendant. Their admissibility for that purpose depends entirely upon the question whether the judge of probate possessed the power, under the law at the time, to license any one, except an administrator proper, to sell land to pay the debts of the estate. If he had not, all the proceedings in the premises were void.

The Statutes of 1843, page 677, very clearly define the extent of the particular powers and duties of a special administrator, showing, in the first place, that his appointment is contingent, and can only be made when for some cause, such as the pendency of a suit concerning the proof of a will, or some other cause, regular administration is delayed. His functions are limited to a few prescribed duties, in relation to the preservation of the personal assets, and these cease as soon as a regular administrator is appointed. He cannot be sued. The statute of limitations does not run against the creditors of the estate during the period of his agency. He is simply an agent, and not an administrator. He has no power to settle the estate; much less power to sell land for any purpose. It was no more competent for the judge of probate to grant him license to sell land, than that of any third person. His act in doing so was extra-judicial, and void. The judge's power over the real estate of deceased persons is derived through the medium of regular administration. This was wanting in

the case before us. Hence his jurisdiction did not, as it could not under the circumstances, attach. The argument, therefore, that the regularity of these proceedings could not be collaterally attacked, has no proper foundation. The law confers upon judges of probate jurisdiction over the settlement of the estates of decedents. This jurisdiction, however, only attaches and becomes effective after granting letters of administration to some one who is to exercise all the powers and duties of a regular administrator. This done, the power to grant a license to sell real estate to pay debts, nevertheless does not arise till a petition, as the law directs, is presented by a legal administrator. When such a petition is presented, jurisdiction over that particular subject is acquired, and the subsequent proceedings, although those of a court of inferior and limited powers, will be presumed as regular and conclusive as those of courts of general jurisdiction, and shall not be collaterally assailed. This, we suppose, is familiar law, but the presentation of a petition in this class of cases is not *enough*; it must be done by an administrator in the full statutory meaning of such a commissioned agent, and it is the union of both of these elements that constitutes the jurisdictional fact upon which the power of the court to act in the premises is made to depend, and they should both appear of record. So far, however, from this being the case, the record affirmatively shows that the petition was not presented by an administrator, but by a person who had no power whatever under the law to act, when the prayer of the petition was granted. And it is this feature of the case that distinguishes it from all the cases cited by counsel for the defendants.

Some of these cases referred to, arose in courts of general jurisdiction, where every intendment of the law is in favor of their proceedings, and of their jurisdiction. Other references, to be sure, are to the proceedings of inferior courts, with limited jurisdiction. But in all these

cases the jurisdiction had so far attached as to require and authorize the court to hear and determine the sufficiency of the facts relied upon to give jurisdiction, whether they related to the law itself, the process, the notice or the petition. Take, as an illustration, the case of *Morrow v. Weed*, 4 Iowa, 77, which is a very fair type of the principle involved in this class of cases. In that case there was a petition by an administrator proper for leave to sell the real estate, but the petition did not state the *value of the personal property*, as the statute required, and it was claimed that this statement was essential in order to confer jurisdiction, for it was insisted that without such statement the court could not determine whether the personal estate was insufficient to pay the debts of the deceased. It will be perceived that this objection goes a step further than the case at bar. It is based upon the idea that before a petition, presented by the right person, can give jurisdiction, it must also contain a statement of these facts required by the statutes. But the court in that case substantially, and we think properly, held that the power or jurisdiction of the court was called into action by the presentation of the petition, (of course presented by the proper person; in that case there was no pretence that the petition was presented by any other than an *administrator*.) And if in exercising its power the court should err in pronouncing the petition sufficient, when it was insufficient, or committed any other irregularity, it did not thereby lose again its jurisdiction, but that all such errors are to be corrected in a direct proceeding by appeal, and cannot be taken advantage of collaterally.

It is difficult to supply a rule under which to determine definitely what are or what are not jurisdictional facts, or, in other words, just when the jurisdiction of a court attaches in a given case. The case of *Morrow v. Weed*, *supra*, and the case of *Cooper v. Sunderland*, 3 Iowa, have

gone as far to sustain guardian and administrator's sales as the courts generally in this country have done.

Yet between the class of jurisdictional questions presented in these cases, and also in most of the cases cited by the defense, and the one raised at bar, there is a clear distinction. In the latter, the want of jurisdiction, for the reasons before stated, is obviously apparent upon the face of the proceedings. In such a case all presumptions are rebutted, and we are not allowed to indulge them. And this rule, in our opinion, is applicable in courts of superior as well as inferior jurisdiction. It follows that the proceedings under the unauthorized license of the judge of probate were nullities, and that the deeds in question were properly excluded.

Second. But the defendant offered other evidence of title, founded upon a tax sale which took place on the 10th day of April, 1843, for the delinquent taxes of 1841 and 1842. The certificate of purchase was originally issued to Wm. H. Tuthill, Esq., by him assigned to Stephen Whicher, who assigned the same to Amos E. Kimberly, to whom the deed was made on failure to redeem, and from whom the defendant derived whatever title it conveyed. The deed thus offered was unobjectionable in form, and by the revenue law of 1841, under the provision of which the sale took place, it was made *prima facie* evidence of the regularity of the sale. This feature of the revenue law of 1841, materially changes the rule generally adopted by the courts, that the party who sets up a title under such a sale, must furnish the evidence necessary to support it, independent of his deed, by showing that every prerequisite of the law had been complied with in conducting the sale. This provision of the statute shifts the burden of rebutting the presumption of regularity upon the plaintiff.

Inasmuch as the court ruled against the defendant's title derived from this source, he must have found that the facts

and circumstances developed by the evidence were sufficient to overcome the *prima facie* title made by the deed. Let us see what the plaintiff's evidence was in this respect. Ordinarily, we suppose, his method would be to show, from the records and files of the collector's office, that in selling the land for the non-payment of taxes there had not been a strict compliance with the requirements of the law. But this privilege was not accorded to him, for the reason no such record or files were *in esse*, or could be found in the collector's office. His witness, H. C. Pratt, testified that he had been treasurer and recorder of Cedar county for six years, during which time he took occasion to examine said office for the record evidence of the sales made by the collector for the taxes of 1841, and that he was unable to find any record evidence whatever of a sale for the taxes of 1841. That he had carefully and cautiously looked with reference to the pendency and object of this suit, and all that could be found was an entry of an order that there should be a tax of a certain amount levied for the year 1841, but no entry or evidence of a tax sale.

Samuel Wampler also testified that he was at that time treasurer and recorder of said county, that he had examined all the records back to the year 1841, that he found nothing indicating a tax sale in 1843, for the delinquent taxes of 1841 and 1842, not even a memorandum in regard to it. In this attitude of the case, what should be the effect of such testimony?

We are inclined to think that it must *ex necessitate* reshift the burden of proof upon the defendant, to account for the absence of this record evidence, or otherwise show from evidence *aliunde* that all the conditions or prerequisites of the law had been strictly observed in making the sale. Some rule must be adopted in cases of this kind, and we cannot perceive why the one suggested is not sound and reasonable. Surely, it is much easier for the ministers of

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the law to show that certain steps had been taken, or for the purchaser to collect and preserve all the facts and muniments of title, on which the validity of his claim depends, than for the taxpayer or original owner to show that the provisions of the law had not been complied with. Indeed, this would be throwing upon the plaintiff the hardship of proving a negative, in this case, when the record evidence had never been filed, or if so had been removed. It is apparent that in every such case the original owner would be wholly without protection.

Now in answer to the above proof, the defendant fails to account satisfactorily for the non-existence of the collector's notice and return of said sale, or other record evidence of the same, but he does undertake to supply some evidence of the same by Judge TUTHILL, who stated that he purchased the property in controversy, that from certain circumstances mentioned he remembered seeing the delinquent list, and the warrant authorizing the sale, &c. Yet this goes a very short way in showing, as we think he was bound to do under the circumstances of this case, that the several steps prescribed by the statutes had been strictly followed.

It is true the defendant's deed undertakes to recite a compliance with the statutory provisions, but these recitals are not evidence against the owner of the property sold. 4 Hill, 76; 2 Denio, 323; 1 Selden, 366; 19 Barb. 644.

The deed shows that it had been drawn with great care and particularity, evidently indicating that the writer intended to set forth all that he thought the law required the officer to do in selling land for delinquent taxes, yet he did omit one requisite, that of stating, "after the clerk and assessor had corrected the assessment roll, and laid it before the board of commissioners, the said board, finding it correct, had accepted the same in writing on the back thereof, signed and attested by their clerk, and filed in his

office." A failure to make this statement in an undertaking to recite all the facts, is evidence, by implication, that it never had been done; if so, the omission vitiated the sale, and repels the *prima facie* force of the deed, according to authority of the case of *Rayburn v. Kuhl et al*, 10 Iowa, 92, which case turned alone upon this point.

The appellees make several other points against the validity of this tax title, the consideration of which we waive, except one, and that is this: The evidence shows that the certificate of purchase of the land in controversy, by Tuthill, was assigned by him to Whicher, before the two years in which to redeem had run out, and that Whicher at that time was the acting attorney for the estate of Robt. Long, deceased; that he stated to Tuthill at the time he purchased the certificate, that he stood in the place of the deceased, and represented the estate, yet he took the assignment to himself. It is insisted that this assignment in law inures to the benefit of the estate, under the circumstances. Payment of taxes, or the redemption of land sold for the non-payment within the prescribed time, is always a good defence against a tax title. Whether the estate of Long did redeem the land in question through Mr. Whicher, the attorney, is chiefly a question of fact, which it was competent for the court below to pass upon, but is not for us. We only refer to it as showing another probable reason, in the mind of the court below, for ruling against the defendant's title.

It only remains to say, that at the trial below it was admitted that the legal title of the land in dispute was in Robert Long at the time of his decease, and that it was still in the plaintiffs, his heirs, unless it had been divested by the defendant's several title deeds offered in evidence.

The court below held that it had not been, and such is our opinion.

Judgment affirmed.

Blake v. Blake.

BLAKE V. BLAKE.

1. DECREE: AMOUNT. Where a petition in equity prayed judgment for the amount *then due*, and no supplemental petition or further prayer was filed, it was held that the court erred in rendering a judgment for a sum which included installments which became due after the commencement of the suit.
2. APPEALS IN CHANCERY CAUSES. Chancery causes are tried on appeal, in the Supreme Court, *de novo*.
3. COSTS: ATTORNEY'S FEES. Attorney's fees cannot, in any case, be taxed to the losing party. An act to repeal part of Sec. 845 of Chapter 31, of the Code of Civil Practice, Special Laws of the Eighth General Assembly, (Revision 1860, page 627.)

Appeal from Dubuque District Court.

WEDNESDAY, APRIL 9.

THE facts are stated in the opinion of the court.

Wilson, Uiley & Doud, for the appellants, contended :

1. That the calculations of the commissioner in finding the amount due were erroneous ; 2. That the installments which matured after the commencement of the action should not have been included ; 3. That the sums paid to plaintiff's agent, his authority never having been revoked, should be charged to her ; 4. That as plaintiff refused to receive the installments as they matured, she should not recover interest thereon ; 5. That the referee should have found the facts, citing *Lambert v. Smith et al.*, 3 Calf. 408 ; 6. That the charge for attorney's fees should not have been allowed by the clerk ; citing Special laws, Eighth General Assembly, p. 34.

Samuels, Allison & Crane for the appellee.

Exceptions to the final report of a master in chancery should be first taken in the District Court, in order to

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bring the objection to the Supreme Court. *Blake v. Dorgan*, 1 G. Greene, 547; *Wilkes v. Rogers*, 6 John. R. 591; *Byington v. Wood*, 1 Paige, 145; *Methodist Episcopal Church v. Jaques*, 3 John. Ch. 79; *Jungk v. Jungk*, 5 Iowa, 543; *White v. Hampton*, 10 Id. 242.

BALDWIN, C. J.—The father of respondent was divorced from the complainant by a decree of the District Court of said county, and in the decree it was ordered that certain property owned by the said husband be subjected to the payment of a certain sum of money to the complainant, as alimony. This sum was to be paid quarterly during the lifetime of complainant, and in case of a failure to pay the same, the property was to be sold as under a decree of foreclosure, and the proceeds applied to the payment of the installments that had become due. The husband died, and the son, the respondent in this case, became the owner of this property, subject to this incumbrance. Upon the 28th day of January, 1859, the complainant filed her bill in equity, representing that the sum of four hundred dollars was then due under this decree, and prayed that the property therein described, be subjected to the payment of said sum.

A final decree was entered up in favor of the complainant on the 18th day of August, 1860, for the sum of \$501-27—this being the sum reported by a master as due, up to the quarter ending December 8th, 1859—nearly eleven months after filing of said petition. The respondent appeals, and claims that the judgment is excessive.

The complainant asks for a judgment only for the sum of four hundred dollars. When the petition was filed, this was the full amount due. There was no prayer for a judgment, or a supplemental bill filed, asking for a foreclosure for the accruing installments, and equity will not furnish greater relief than is prayed for. See *Cooper v. Fredericks*, 4 G. Greene, p. 403. The court therefore erred in rendering

judgment upon the master's report, for the amount of the installments accruing after the bill was filed.

It is claimed by the counsel for appellee that this objection was not made in the court below, and cannot be raised for the first time in this court. If this was a case at law, this position would be a tenable one; this, however, is a proceeding in chancery, and it has been settled that the facts as well as the law of the case can be readjudicated by the Supreme Court, in chancery causes. See *Pierson v. Wilson et al.*, 2 Iowa, 20. Appeals in chancery are heard in the supreme court *de novo*, the same as if it had original jurisdiction of the cause, regardless of the decision of the court below. *Austin & Spicer v. Carpenter*, 2 G. Greene, 131, 135.

Appellant further complains of the taxation of \$10 attorney's fees as part of the costs of the case. In the special acts of the Eighth session of the General Assembly, page 34, it is provided that no attorney's fee shall in any case be taxed as costs against the losing party. See Note in Revision, page 627.

The decree of the district court is modified, and final judgment ordered to be entered in this court in favor of the complainant, for the sum of four hundred dollars, and a decree of foreclosure ordered as prayed for by complainant; no attorney's fees to be taxed as part of the costs of the case. As thus modified, the judgment is affirmed, at the cost of appellee.

FANNING *et al.* v. STIMSON *et al.*

1. LEASE : COVENANTS: RESERVATION OF RENTS. In a contract of lease a reservation of rent was in the following words: "At a yearly rent of one thousand dollars for the first ten years, and twelve hundred and fifty dollars for the remaining nine years, payable at the expiration of each and

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every year of the lease. * * * * * The said lessees well and truly keeping and performing their part of these premises, to be by them performed as aforesaid." It was held, that the language amounted only to an implied covenant to pay the rent, and the liability of the lessee determined on the assignment of the lease to another, and the acceptance of rent by the lessor from the assignee.

Appeal from Dubuque City Court.

WEDNESDAY, APRIL 9.

THE facts are stated in the opinion of the court.

John H. O'Neill and John L. Harvey for the appellant.

I. If rent be reserved generally, without saying to whom, the lease will carry it to the owner of the reversion. *Tayl. Land. and Ten.* §§ 154-156.

II. The phrase "during the lease" is equivalent to "during the term." 1 *Hilliard Real Prop.* p. 20, § 32.

III. The words "yielding and paying" make an express covenant. 1 *Wheat. Selw.* 381, note 7; *Hollis v. Carr*, 2 *Mod.* 87; *Esp. Nisi Prius*, 312, et seq.; 7 *Pet. Abr.* 85; 1 *Swift's Digest*, 354; *Viner's Abr. Covenant C.* 10; *Rolle's Abr. Covenant C.* 519; *Hellar v. Gaspard*, *Lid.* 266; *Tilden v. Walker*, *Id.* 477; *Newton v. Osborne*, *Styles*, 387, 406, 431.

IV. The words in this lease upon which the covenant to pay rent arises, are not the technical words "yielding and paying," nor any words of art having a known legal signification, but terms of common use, clearly conveying to the non-professional mind the obligation of the lessee to pay the rent. As to the character of the covenant, see *TINDALL, C. J.*, in *Williams v. Burnell*, 1 *Man. Gr. & Sc.* 429; *Hallett v. Wylie*, 3 *John.* 46; *Rains v. Kneller*, 4 *Carr. & Payne*, 8. As to what words will make an express covenant, see *Brett v. Cumberland*, *Cro. Jac.* 399; *Marshall v. Craig*, 1 *Bibb*, 379; *Wright v. Tuttle*, 4 *Day*, 321; *Mitchell v. Hazen*, 4 *Conn.* 508; *Bull v. Talbot*, 5 *Cow.*

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170; *Mead v. Billings*, 10 John. 99; *Livingston v. Stickle*, 8 Paige's Ch. 402; 2 Bac. Abr. Title Covenants, A; Whart. L. Lexicon, Title Covenant, p. 227; Com. Dig. Title Covenant, 2.

John Hodgden and J. S. Covel for the appellee.

I. Rent reserved generally, without naming heirs, administrators or assigns, accrues only to the lessor, unless it is made payable "during the term." 2 Platt on Leases, 88; *Bland v. Inman*, Cro. Car. 288; *Richmond v. Butcher*, Cro. Eliz. 217; *Sacheverall v. Froggatt*, 3 Saund. 698; 4 Bac. Abr. 81, Executors and Administrators, H; *Jacques v. Gould*, 4 Cush. 384.

II. A covenant in law arising upon the *reddendum* through privity of estate runs with the land, and after assignment and the acceptance of the assignee, the lessee is no longer liable for rent. The acceptance of rent by the lessor from the assignee, is an admission that the assignee is his tenant. Platt on Leases, 163, 355. *Fisher v. Ameers*, Browne & Gold, 20; *Wadham v. Marlowe & East*, 314; *Marsh v. Brace*, Cro. Jac. 334; *Brett v. Cumberland*, Cro. Jac. 523; *Kempton v. Walker*, 9 Verm. 191; *Iggalden v. May*, 9 Ves. Jr. 330; *Vyryaw v. Arthur*, 1 Barn. & Cress. 416; 2 Bac. Abr. 557, Covenant B.

III. The words "yielding and paying" or "at the yearly rent" imply the condition on which an estate is to be held, and aided by privity of estate, constitutes a covenant in law, but not an independent obligation that will bind the lessee for the payment of rent, after the assignment of his lease, and the acceptance of the assignee as tenant by the lessor. And there are no words in the lease which indicate an intention on the part of the lessees to bind themselves by an independent contract to pay the rent for the whole twenty-five years, whether they parted with the estate or not. 2 Bac. Abr. Cov. B.; 2 Platt on Leases, 162;

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1 Saund. 241; *Iggalden v. May*, and *Kempton v. Walker*, *supra*; Dom. Civ. L. § 2, div. 21; *Salsbury v. Phillips*, 10 John. 57; *Culver v. Sisson*, 3 Com. 264; *Scott v. Fields*, 7 Watts, 360; *Drummond v. Richards*, 2 Mum. 337; *Wolveridge v. Steward*, 3 Moore & Scott, 365; *Briscoe v. King*, Cro. Jac. 281.

IV. The action as to Jesup's Executors is barred by the Statute of Limitations, Code of 1851, § 2405.

LOWE, J. — An action to recover rent due upon a lease submitted to and tried by the court, who found the following facts, to wit:

1st. The exhibit attached to the original petition filed by plaintiffs, is a copy of the lease upon which suit is brought, and which was made by James Fanning, in his lifetime, to Frederic S. Jesup in his lifetime, and Edward Stimson, one of the defendants.

2d. Said James Fanning died about the third day of May, 1857, and plaintiffs are his legal heirs. Frederic S. Jesup died about the third day of October, 1856, and defendants, Smith, Boisot, and M. K. Jesup, are the executors of his last will and testament.

3d. Edward Stimson, one of the lessees and defendants, conveyed all his interest in the leasehold premises to Frederic S. Jesup, his co-lessee, on the 23d day of January, A. D. 1856, by deed duly acknowledged and recorded, as set up in answer of said Stimson. That on the first day of January, A. D. 1857, the said executors of said F. S. Jesup, by deed duly acknowledged and recorded, conveyed all their interest in said leasehold premises, and all the interest of their said testator, and the interest acquired from said Stimson by their said testator, absolutely and fully to Isaac E. Taylor, as set forth in answer of defendants. That said Taylor, on or about the 11th of March, A. D. 1857, entered into an agreement with one B. W. Balch, in writing, to sell

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and convey to said Balch, his interest in said leasehold premises. That afterwards said Taylor conveyed the same by deed to Balch, dated the 24th of September, 1857, and duly recorded in the registry of deeds for said county, in book No. 5 of town lots, page 185, and that no rent was due at the time of the assignment of the lease and the acceptance of rent by the lessor from the assignee.

4th. That said James Fanning was paid up in full for the rent of said leasehold premises to the first of June, A. D. 1856, by said Frederic A. Jesup himself. That after the death of said Jesup, his said executors paid to said James Fanning, in person, five hundred and fifty dollars, and said Balch paid to said James Fanning, in person, fifty dollars, and after the death of said James Fanning, the said Balch paid to M. M. Hayden, administrator, and Catharine Fanning, administratrix, of the estate of said James Fanning, said Catharine being one of the plaintiffs, the further sum of sixteen hundred and fifty-eight dollars; that said payment to said Hayden and Catharine inured to the benefit of, and was in fact made to, plaintiffs.

5th. That the following order was made by the County Court of Dubuque county, Iowa, at the September term of said court, A. D. 1858, to wit:

"ESTATE OF F. S. JESUP. — *Sept. Term, 1858.*

"*Ordered*, that the executors of said estate shall cause to be published a notice of their appointment.....
.....for.....week in the daily.....
four.....a daily newspaper published in Dubuque.

"S. HEMPSTEAD, *County Judge.*"

The above evidence was shown by the clerk of the said County Court, to have been produced from the files of said court to be signed by the county judge, but was not recorded in the records of said estate. It is further found by the court, that this claim was not pending in District or Supreme

Court, and was not filed within eighteen months of publication of notice, pursuant to said order. Said publication was made four weeks in the Dubuque Express & Herald, a daily newspaper published in Dubuque, commencing 24th September, 1858. That the will of Jesup provided that his executors should continue the business of banking for five years after his death, and for that purpose might use the sum of ten thousand dollars; also that they should leave the sum of five thousand dollars in the firm of Edward Stimson & Co., for five years. That none of the debts of the estate of Jesup had been paid, that there was a suit for fifteen thousand dollars still pending in the Supreme Court against the estate. That there is a large amount of property of the estate in Illinois, still undisposed of, and which will have to be disposed of before the estate can be settled up and the administration closed, and that several suits had been commenced against the executors since the eighteen months expired, and judgments rendered thereon, without objection by executors.

Upon the foregoing facts under the pleadings in the case, the court found that the plaintiffs have no cause of action against the defendants or either of them for rent.

The single question raised by the assignment is, whether the court reached a correct conclusion upon the facts found.

The lease referred to, in the above statement of facts, is in the nature of an indenture, upon a lot in the city of Dubuque, running twenty-five years from the 1st day of June, 1854, "*At a yearly rent of one thousand dollars for the first ten years, and twelve hundred and fifty dollars for the remaining nine years, payable at the expiration of each and every year of the lease.*" * * * * "The said lessees well and truly keeping and performing their part of these presents to be by them performed as aforesaid."

The words above italicised are the only reservation of rent contained in the lease. Whether they amount to an

express or implied covenant to pay rent is the important question to be determined in this cause. For, if the former, it will be conceded that under the privity of contract arising from such a covenant, the obligation of the lessees to pay rent runs with the land, and continues during the whole term. On the other hand, if it is a covenant of the latter description, then the liability of the tenant founded as it is on privity of estate, only determines upon the assignment of the lease to another, and does not survive the acceptance of rent by the lessors from the assignee. 2 Platt on Leases, 162, 163, 355; *Marsh v. Brace*, Cro. Jac. 334; Id. 523; 9 Vermont, 191.

Returning to the question then, whether the covenant arising upon the above *reddendum* in this lease is express or implied, we remark in the first place, that it is plain that the lease contains no undertaking or promise in *terms* or *words*, that the lessee will pay the lessor or his assigns, &c. The rent reserved is general, not to be paid to the lessor, or at the close of the term, but at the expiration of each and every year of the lease. It does not purport upon its face to create a personal obligation on the part of the lessees, distinct from and irrespective of the covenant which runs with the land. Now, aside from all authority bearing upon this point, it would seem to be not only a natural but a sound inference of law, that inasmuch as leases are assignable under the statutes, that a covenant to pay generally during the term, and not in express terms to the lessor, must necessarily run with the land, and therefore is implied, and cannot and ought not to be held to bind the assignor to a performance of the conditions therein, especially after, (as in this case) the acceptance of rent from the assignee.

Besides, the covenant arising upon the *reddendum* of this lease, as above set forth, is not stronger as affecting the continued liability of the lessees, than the covenant created

by the words "*yielding and paying*." Whether these latter words in a lease amount to an express or implied covenant, the authorities are to some extent contradictory, as a reference to those cited by the appellants will show. Still, it is believed that the weight of all later opinions favor the idea that they amount only to an implied covenant. A fair type of the more recent of these opinions will be found reported in the 9th Vermont, 191, in the case of *Kempton v.*

Walker, where Judge PHELPS, in remarking upon a lease containing no covenant *in terms* on the part of the lessee, for the payment of rent, the demise being upon the condition of his "*yielding and paying*" the rent specified, says in relation to the question whether such words amount to an express or implied contract, that "the old authorities appear quite contradictory, and the elementary writers have handed them down to us as they are. On the whole, however, the weight of authority, and especially of modern authority, appears to be in favor of holding these covenants implied."

* * * * "It seems to me obvious that the distinction has reference to the matter of the obligation, and that unless the lessee bind himself personally, in express terms, to the payment of the rent, his obligation is incident to his estate, and so far as it gives a personal remedy by action of covenant, it is implied. It was doubtless competent for the lessee to assume upon himself to pay the rent, as an enduring obligation which might survive an assignment of his term. Whether he has done so in any given case is a question of intention to be gathered from the deed. If he expressly undertake, promise, or covenant to pay it, the question is at rest; but if he merely accepts the lease, which reserves the rent, and has the power by law to assign the term, the absence of such express undertaking affords strong evidence of the intent of the parties on this point."

* * * * "Upon the whole, we think this covenant is to be considered an implied one, so far as respects the ques-

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tion between these parties, and that it does not, on the face of it, import a mere personal obligation resting upon the defendant, upon the footing of an express contract after his tenancy has ceased." Between the case at bar and the one discussed by Judge PHELPS, of Vermont, there is no perceptible difference in principle.

The clear, strong, common-sense view which that distinguished jurist has taken of this much mooted question, will commend itself to the profession, as it has to this court, and adopting a similar line of thought upon the subject, we have but little hesitation in declaring that the law of this case, upon the facts found, is with the defendants, and that the judgment below should therefore be

Affirmed.

READ V. HOWE.

1. **APPOINTMENT OF ADMINISTRATORS.** The Probate Court may appoint one or more administrators of an estate, and an appointment of an additional administrator, against the protests of the one first appointed, will not be disturbed when it does not appear that the court has abused its discretion in making such appointment.
2. **AGREEMENT OF SEPARATION.** An agreement of separation does not dissolve the marital relation of the parties, nor divest the wife of the first right to administer upon the estate of the husband.

Appeal from Black Hawk District Court.

WEDNESDAY, APRIL 9.

THE facts are fully stated in the opinion of the court.

Brainard & McClure for the appellant.

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The appellee had no interest in the estate of her husband, and was not entitled to administration. The deed of separation operated as an entire and complete relinquishment of all rights or interest she could have in the estate of her husband. *Baker v. Barney*, 8 John. R. 72; *Fenner v. Lewis*, 10 Id. 88; *Beach v. Beach*, 2 Hill, 260; *Hutton v. Duay*, 3 Barb. 100; *Carter v. Carter*, 14 S. & M. 59; *Wood v. Wardens*, 20 Ohio, 518; *Kinman v. Daniel*, 13 B. Monr. 496; *Bright Hus. & W.* 313; *Charles v. Charles*, 8 Grattan, 486; *Barrow v. Barrow*, 24 Verm. 375.

W. T. Barker, for the appellee, relied upon § 2343, Revision of 1860; *Parham v. Parham*, 6 Humph. 287; *Watkins v. Watkins*, 7 Yerg. 283.

LOWE, J. — In August, 1859, Prescott H. Read died intestate. C. K. Howe was appointed his administrator. In September following, application was made to the county judge of Black Hawk County, by the surviving widow of the deceased, for letters of administration, based upon what was claimed to be a precedent right under the statute to administer. The estate was represented to be worth \$20,000. The application was resisted by Howe, the previously appointed administrator, mainly upon the ground that the applicant had no interest whatever in the assets and property of the estate, having, by articles of separation, entered into with the deceased, on the 18th day of October, 1858, in the county of McHenry, State of Illinois, relinquished, for the consideration therein named, all right of support and maintenance, and all interest by way of alimony, dower or otherwise, in or to any personal or real estate of which the said Preston H. Read was then or might thereafter be seised or possessed of. The applicant replied, that the contract specified was contrary to the policy of the law, and void; that it was obtained through

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duress, and had been disregarded and violated by the deceased in his lifetime.

Upon hearing, the County Court deemed it advisable, under the circumstances, to appoint the applicant an executrix, in conjunction with the said Howe. Upon an appeal to the District Court, this decision was affirmed, and we see no sufficient reason for changing the order, now that the matter is brought before us. The power to appoint more than one executor is clearly given in the statute. There is no showing in the record that the judge of probate has abused his discretion in the premises. There is nothing to show that Mr. Howe is a relative or a creditor, or that he has any superior claim to administration over Mrs. Read, even supposing the contract of separation a valid one, — a question upon which we should forbear now to express any opinion, for the reason that we can readily conceive how very important rights may turn upon that very question.

What provision of the statute has been violated by this appointment has not been shown, nor in what the irregularity consists, except the alleged reason that she has no interest whatever in the estate. If that be true, still, from all we can discover in the record, she stands upon an equal footing with Mr. Howe. He claims no precedence as a preferred executor under the statute, and if he does not like the companionship of Mrs. Reed in the administration, it is his privilege to throw up his commission and retire. On the other hand, whatever may be said touching the validity of the articles of separation in this case, it cannot be claimed that they had the effect to dissolve the marital relations of the parties, and that after all, at the death of Mr. Read, his wife was in law his widow, and, as such, technically had the first right to administer upon the estate. And as this right does not seem to be limited or qualified in any way by the statute we do not see why she has not as good ground

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to complain of being associated with a stranger in the administration, as this stranger has with her.

Affirmed.

PELAN V. DE BEVARD *et al.*

1. LEASE: HOMESTEAD: ASSIGNMENT. P. leased to S. a certain lot for a term of five years, for an annual rent agreed upon, and in the contract it was further agreed that if S. should erect a building suitable for a family, and a stable on said premises, the lessor should pay to the lessee the value of the same on the expiration of the term. The lessee made the proposed improvements and occupied the house as a homestead: *Held*,

1. That the right to the possession of the premises during the term under the lease could not be assigned by the husband without the concurrence of the wife.

2. That an assignment by the husband alone would carry to the assignee the right to recover of the lessor the value of the improvements at the expiration of the term.

Appeal from the Dubuque District Court.

WEDNESDAY, APRIL 9.

PELAN leased to SNOW certain premises for the term of five years, from and after the first day of April, 1855. SNOW was to pay an annual rent of sixty dollars. It was further agreed that if SNOW should erect a building suitable for a family, and a stable, on the leased premises, the lessor was to pay him at the expiration of the lease, the value of the same, to be estimated by persons to be chosen by the parties. SNOW did make the proposed improvements, and occupied the house, so erected, as his homestead. On the 12th November, 1856, he made an assignment of this lease, as follows:

13	53
88	486
13	53
97	682
13	53
103	289
13	53
1109	871
4109	877
18	53
122	404

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"For value received, I hereby assign, transfer, set over and sell unto Frederick W. De Bevard, his heirs and assigns, all my right, title and interest in and to the within lease, as witness my hand, this 12th day of Nov., 1856.

"HARVEY SNOW."

On the 28th of August, 1857, De Bevard made a similar assignment of the written lease to Goodrich, Willard & Co. the said De Bevard then being in possession of the premises. Dec. 1, 1857, De Bevard and wife mortgaged the leasehold premises to Milton, Conger & Cole, describing the same thus: "the following described premises and the lease thereof, to wit: Lot No. &c., (giving the description,) also all buildings and improvements erected on said premises. Also all my interest in the lease or balance of the term of years of said lot from C. Pelan to said grantor." The notes secured by said mortgage were assigned to Vanhorn, Luce & Co. The mortgagees and their assignees had notice of the assignment to Goodrich, Willard & Co.

In an action between Pelan and De Bevard, it was found that a certain amount was due for improvements, which was paid into court. The court below deemed that this sum should be applied to the payment of the mortgage, and from this order Goodrich, Willard & Co. appeal.

Cooley, Blatchley & Adams for appellant, argued:

I. That said firm had at least as good title as De Bevard, for the reason that Mrs. Snow did not join in the assignment through which he claims.

II. That a leasehold interest is not real estate, and therefore a legal homestead cannot be carved out of it. 2 Bouv. Inst. 265; *Murdock v. Radcliffe*, 7 Ohio, 119.

III. The lease contains two distinct contracts—one is for the use and occupation of the lot for a term of years, and in the other the lessor agrees to pay at the expiration of the

Pelan v. De Bevard.

term for the improvements a sum to be ascertained in a certain way specified; and if the assignment without the concurrence of the wife was invalid as to the first, it was invalid as to the second.

W. C. Friend and *Thomas M. Monroe* for appellee,

Contended that as the assignment by Snow to De Bevard was accompanied by the possession, and the assignment to appellant was not so accompanied, appellee had the better title; and that the lease was a chattel real, out of which a homestead could be carved, citing Bla. Com. 2 Book, p. 386; Reeve's Dom. Rel. 22; 2 Kent's Com. 134.

WRIGHT, J. — It is claimed by appellees that the premises constituted the homestead of De Bevard, and that the assignment by him to appellants was void, because his wife did not join in the conveyance. To this it is answered that De Bevard had but a leasehold interest, which is not a legal estate, and that a homestead cannot be carved out of it. This position we do not think tenable. The head of a family, who, as the owner of the homestead, is entitled to the exemption provided by statute, is not limited to any particular estate, either as to its duration or extent. The homestead is liable for taxes, and subject to a mechanic's lien. (§ 1248.) Will it be claimed that the "house used as a home," erected on leased premises, was not liable to these charges? It may be sold to satisfy debts created prior to the passage of the law, or prior to its purchase, but not until the other property of the debtor is exhausted. And would it be claimed that if on leased premises, it was liable in the first instance, and without reference to the time of its purchase? Such a construction would violate, as it seems to us, the whole spirit and policy of the law. Not only so, but the homestead may embrace "one or

more tracts of land, with the buildings thereon," (§ 1251,) and the term "land," includes "all rights thereto, and interests therein, equitable as well as legal." (§ 26 ch. 8.)

Then again, the interest was such as might be sold under execution and redeemed, (Code, § 1924,) so that we think the language of the law is in accordance with its reason and correct policy. It is certainly as reasonable and consonant with the whole scope and purpose of this exemption to extend it to the man who can procure a possession for a term of years, as to one who has the fee simple.

It is next claimed that the contract between Pelan and Snow consists of two parts — 1st, a grant of the lot for a term of years; 2d, an agreement on the part of Pelan to pay for the improvements at the expiration of the term, and that the assignment would be good without the joinder of the wife, so far as it related to the second part, though invalid as to the first. And this position, we think, is correct. This right of Snow, or his assignee to compensation for his improvements, was not a part of the homestead. It was independent of it, and was as much the subject of transfer or assignment as a promissory note or any other debt against Pelan. Such an assignment or sale is in no sense a conveyance, within the meaning of the statute. All right to the possession of the premises was at an end, at the time of the decree. The lease had expired, and there was nothing left in which either or any of the parties had any interest, except the question of pay for the improvements. Not only so, but De Bevard's assignment from Snow is precisely of the same nature as that from De Bevard to appellants. And we think it is well said, that, if appellants are not entitled to this money, neither are appellees, for they claim under a mortgagor who had no title; and if this be so, then Snow is entitled to it, and should have been made a party. That he is entitled to it, no one claims. It is a question of prior right between contending creditors, and,

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in our opinion, the money should be paid to appellants, who are first in time with equal equities.

Reversed.¹

ENGLISH v. WAPLES *et al.*

1. **NOTICE: PRIORITY OF LIENS.** A junior mortgage recorded prior to a senior mortgage is entitled to priority of lien, unless the junior mortgagee, and those claiming under him, had actual or constructive notice of its contents or existence; or such notice as was sufficient to put them, as reasonable men, upon inquiry, particularly if such inquiry would have led to a discovery of the rights of the senior mortgagee. And such notice is sufficient if imparted before the completion of a contract of purchase, or the payment of the purchase money, though not until after the terms of the contract have been agreed upon.
2. **SAME: NOTICE TO AN ASSIGNEE.** Where the second mortgagee had actual notice of the existence of a prior mortgage, which was recorded before an assignment of the second mortgage, it was held that the assignee was charged with notice.

Appeal from Dubuque District Court.

WEDNESDAY, APRIL 9.

ON the 8th of July, 1856, Waples and Walmsley made a mortgage on certain real estate, to secure a debt, then owing by them to the complainant, English. This mortgage was duly filed for record, July 7, 1858. These same parties (mortgagors,) on the 14th of October, 1856, mortgaged the same, with other lands, to Dennis N. Cooley. In October,

¹ The counsel for the appellee filed a petition for a re-hearing of this cause, upon the ground that the assignment executed by De Bevard to Goodrich, Willard & Co., the appellants, did not transfer the second part of the contract—the right to recover for the value of the improvements at the end of the term. The assignment was in form similar to the one set forth in the statement of the case *supra*. The petition after being duly considered by the court, was overruled.

13	57
85	201
13	57
99	314
13	57
105	236
18	57
119	139

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1857, Cooley assigned his mortgage to Samuels, who in February, 1859 assigned the same to Mason. The cause was heard on bill, answer, replication and proof, and a decree entered, giving the Mason (Cooley) mortgage priority, and complainant appeals.

Wilson, Utley & Doud and *F. E. Bissell* for the appellant.

I. The plaintiff's mortgage having been recorded in the county where the land in question is situated, before the assignment of the Cooley mortgage to Mason, who thereby had constructive notice of its existence at the time of the assignment to him, he is bound by such notice, unless a superior equitable right had been acquired by Samuels, his assignor, which passed to him.

II. The plaintiff has an equitable lien on the lands, as vendor, for the unpaid purchase money, and his deed of the land to Waples and Walmsley, specifying the amount of it, which was recorded immediately after its execution, was constructive notice to all the world of the existence of his lien, so that the subsequent mortgages, whether in the hands of the mortgagees or their assignees, should be subject to such lien. *Chapman v. Tanner*, 1 Verm. 267; *Austin v. Halsey*, 6 Ves. 475, 483; *Nain v. Prowse*, 6 Id. 672; *Hughes v. Kearny*, 1 Shoales & Lefroy, 182; *Bond v. Kent*, 2 Verm. 281; *Gibbons v. Baddall*, 2 Eq. C. Abr. 682 n; *Harrison v. Southcote*, 2 Ves. 389; *Walker v. Preswicke*, Id. 622; *Burges v. Wheat*, 1 Bla. 123; *Becket v. Cordley*, 1 Bro. C. C. 553; *Blackburn v. Greyson*, Id. 420; *Smith v. Hubbard*, 2 Dick. 730; *Cornell v. Simpson*, 16 Ves. 278; *Copper v. Spotswoode*, Tomlyn, 21; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Garson v. Greene*, 1 John. Ch. R. 308; *Elliott v. Edwards*, 3 Bos. & Pul. 181; *Winter v. Ld. Anson* 3 Russell, 488; *Tompkins v. Mitchell*, 2 Rand. 428; *Thornton v. Knox's Executors*, 6 B. Monr. 74; *Williams v. Roberts et al.*, 5 Ohio, 35; *Ross v. Whitson*, 6 Yerger, 50; *Deibler*

v. *Barwick*, 4 Blackf. 339; *Dyer v. Martin*, 4 Scam. 148; 5 Ala. 368; 1 Smedes & M. 197; 6 Id. 286; 4 Mo. 263; 1 Texas, 326; *Boos v. Ewing et al.* 17 Ohio, 500; *Coombs v. Coombs*, 17 Id. 289; *Watson v. Wells*, 5 Conn. 468; *Patterson v. Johnson*, 7 Ohio, 225; *Aldridge v. Dunn et al.*, 7 Blackf. 249; *Young et al. v. Isett*, Morris, 460; *Pierson v. David*, 1 Iowa, 23; *Gilman v. Brown*, 1 Mason, 192; S. C., 4 Wheat. 256; *Manly v. Mason*, 21 Verm. 271; *Weed v. Beebe*, Id. 496.

III. Unrecorded instruments affecting real estate are valid against subsequent purchasers, with notice. Code of 1851, § 1211; *Dussuame et al. v. Burnett et al.*, 5 Iowa, 95; *Miller v. Chittenden et al.*, 2 Id. 315; *Bell & Co. v. Thomas*, Id. 384; *Blain v. Stewart*, Id. 378.

IV. The assignment by Samuels of the Cooley mortgage to Mason, was the assignment of a chose in action, and not the assignment of an estate; it was the assignment of a chattel interest; of a security; of an incident to the principal debt; and of course, is subject to the same equities and rights in the hands of the assignee as it would be in the hands of Cooley, the assignor. The mortgagee knew of the existence of the Plaintiff's mortgage, when he took his, and aside from the constructive and actual notices which his assignee and persons holding under him, had of its existence and his lien as vendor, they acquire no greater right than such assignor had. *Hall v. Rider*, 5 Cush. 231; *Zieller v. Bowman*, 6 Barb. 133; *Calkins v. Calkins*, 8 Ib. 305; *Green v. Hart*, 1 John. 580; *Jackson v. Bronson*, 19 Id. 325; *Wilson v. Troup*, 2 Cow. 195; *Runyan v. Mercerau*, 11 John. 534; *Craft v. Webster*, 4 Rawle, 255; *Cooper v. Davis*, 15 Conn. 556; *Gardner v. Heartt*, 3 Denio, 282.

T. M. Monroe and *Ben. M. Samuels* for the appellee.

The title of a purchaser or incumbrancer who takes with

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notice of a prior unrecorded sale or lien, shall be postponed to such sale or lien; yet, if the latter put his conveyance upon record, and then sell for a valuable consideration, to a *bona fide* purchaser, who has no notice, the latter shall have priority over the first purchaser or incumbrancer. *The State of Connecticut v. Bradish*, 14 Mass. 296; 3 Sug. Ven. 260, and note 2; *Norcross' Executrix v. Widjery*, 2 Mass. 506; *Trull v. Bigelow*, 16 Id. 405; 1 Lomax Dig. 395; *Curtis v. Lane*, 6 Mumf.; *Murray and Winter v. Ballou and Hunt*, 1 John. Ch. 565; *Damarest et ux. v. Wyncoop et al.*, 3 Id. 129; 2 Rob. Pr. 30; citing *Southal v. McKean*, 1 Wash. 336.

WRIGHT, J. The mortgage to Cooley, though subsequent in date, was filed for record before that to complainant. It is entitled to priority, therefore, unless Cooley, and those holding under him, had actual or constructive notice of its contents or existence, or such notice as was sufficient to put them, as reasonable men, upon inquiry, and particularly so, if such inquiry would certainly lead to a knowledge or discovery of the complainant's right or equity.) And such notice would be sufficient if imparted before the completion of the contract, or the payment of the purchase money, though not until after the terms of the trade had been agreed upon.

Guided by these familiar principles, we are constrained to hold that this decree is erroneous. The testimony satisfies us that Cooley had actual notice of the mortgage to English, at the time he took his, and that Samuels had the same notice before he consummated his purchase. The testimony, it is true, is in some degree conflicting, but the decided preponderance is in favor of complainant's position. As to Mason, he is affected with constructive notice, for, at the time of his purchase, the English mortgage was recorded. If he stands in the attitude of a purchaser, then he was bound to take notice of this mortgage, which was

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made and recorded before he parted with his money, or negotiated his purchase. If he stand as an assignee of the mortgage, he is in no better condition. While the first mortgage was not recorded at the time Cooléy and Samuels acquired their rights, yet, as they had actual notice, the transfer by Samuels to Mason, who, at the time, had constructive notice, could place the last holder in no better condition nor give him any greater equities than the first, or original mortgagee.

Reversed.

BEALL V. WEST *et al.*

1. JUDGMENT: JOINT OBLIGATION: MERGER. A decree in foreclosure which finds and determines the order and amount of the several liens on the mortgaged premises, and finds and adjudges that there is due from a firm of which the mortgagor is a member, to another defendant, a certain sum on a copartnership note, secured by a junior mortgage, and orders a sale of the mortgaged property for the payment of the same, without giving the holder a full and complete remedy against such mortgagor, does not operate to discharge the other joint obligors.

Appeal from Dubuque City Court.

WEDNESDAY, APRIL 9.

THE material facts are sufficiently stated in the opinion of the court.

John H. O'Neill and *John L. Harvey* for the appellant.

I. The judgment against West, and in favor of Beall, in the case of *Richard Bonson v. George R. West & Co.*, released the defendants, Power and Spaulding, from liability on the note, and was a bar to this action. *Robertson v. Smith et al.*, 18 John. 459; *Bellshover v. The Commonwealth*,

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1 Watts, 126; *Williams et al. v. McFall et al.*, 2 S. & Rawle, 230; *Downey v. The Farmers' and Mechanics' Bank, of Greencastle*, 13 S. and R. 288; *Gibbs v. Bryant*, 1 Pick. 118, 121; *Ward v. Johnson*, 13 Mass. 148; *Perry v. Martin et al.*, 4 John. Ch. 566.

II. It can make no difference that the judgment pleaded was rendered by a court of chancery, in an equitable proceeding. Such a decree is as effectual, as a bar, as the judgment of a court of law. *Winans v. Dunham*, 5 Wend. 47; *Gaines, Administrator, v. Strode*, 5 Litt. 314; *The United States v. Nourse*, 9 Pet. 8, 28; *Thompson v. Clay*, 3 Monroe, 359.

III. The court which rendered the judgment in the suit pleaded in bar had, by statute, the powers both of a court of law and equity, and could foreclose the mortgage and render a judgment for the debt, and award execution against the property of the debtor generally. Code of 1851, chap. 118; *Kramer v. Rebman*, 9 Iowa, 114.

Cooley, Blatchley & Adams, for the appellee contended :

1. There was no judgment rendered in the foreclosure suit against West, personally, but merely a judgment of foreclosure against the mortgaged property. 2. West, Powers & Co., could not have been properly joined in the foreclosure proceeding. *Sands v. Wood*, 1 Iowa, 263; 3. That while a decree for the amount found due, and a judgment on the bond, may be had at the same time, but one can be enforced. *Knetzer v. Bradstreet*, 1 G. Greene, 382; *Cooley et al. v. Hobart*, 8 Iowa, 358.

BALDWIN, C. J. — This action is upon a promissory note, signed by the defendants in their firm name, and under style of West, Powers & Co., and payable to Hezekiah Beall, the assignor of plaintiff. The defendants, Powers and Spaulding answered separately, and the only portion of

their defense which it is material now to refer to, is that which denies the plaintiff's right to recover, for the reason that in a certain case in the Dubuque District Court, wherein one Bonson was complainant, and the said Beall and West and others were respondents, the said Beall claimed and obtained a judgment against said West for the amount of said note, whereby Powers and Spaulding were discharged from all liability thereon.

The defendant West, answered separately, from which it appears, that, to secure the payment of said partnership note, West and wife had executed to said Beall, a mortgage on certain real estate, which had been purchased by West from Bonson, and for which West had only a bond for a deed. West further states in his answer, that Beall had brought his action of foreclosure, and had obtained a decree for the sale of the property so mortgaged, with an order that the proceeds of such sale be applied to the payment of the note so secured; and that by reason of such proceeding, he, West, was discharged from further liability. Powers and Spaulding plead specially the Bonson decree, and West plead specially the Beall decree, as a bar to the right of plaintiff to recover.

It may be here remarked that West does not appeal, and the fact that Beall had obtained a decree of foreclosure against West, as set up by him in his special answer, is not a matter of defense by the appellants. The decree in the Bonson case is the only one relied upon, as showing that they were released from liability on said note.

It appears from the record introduced in evidence, that Bonson filed his bill in equity for the purpose of enforcing against West a vendor's lien upon the premises mortgaged by West to Beall. West, Beall, and other incumbrancers, were made parties defendant to this bill, for the purpose of declaring the priority of the several liens on said lands. In the final decree in this Bonson case, after reciting that

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there is so much due by West to Bonson, and the complainant recover, &c., the following appears as part of the same entry: "And that Hezekiah Beall, have and recover of the said George R. West, the sum of two thousand nine hundred dollars, (the amount of the note signed by said firm,) and that the property be sold," &c. The court refused to instruct the jury at the request of the defendants, that if they believed from the evidence that a decree was rendered by the District Court in favor of Hezekiah Beall on the same identical note, against George R. West, one of the firm of West, Powers & Co., prior to the commencement of this suit, in the case of *Bonson v. West, Beall et al.*, then the plaintiff is not entitled to recover. The refusal of the court to give this instruction is the only ruling the appellants can rely upon for a reversal. The position assumed by counsel for appellants is, that a judgment against one of the several joint obligors is an extinguishment or merger of the original liability; that the holder of a joint note by taking a judgment against one of the joint makers, releases the other co-obligors, and trusts to the new and higher security, — the judgment.

The first question to be disposed of is, whether Beall ever obtained a judgment against West, one of the co-obligors. If not, the appellant's defense falls to the ground. It will be recollected that Bonson brought his proceeding to enforce against West a vendor's lien. Beall was a mortgagee under West, Bonson's vendee. Beall was not the complainant. He did not institute any proceeding to recover upon the note given him by West, nor did he, in his answer to Bonson's claim, ask a judgment against his co-defendant, West. In the decree, the amount due by West to the complainant and to Beall is stated, and the property mortgaged ordered to be sold, — the proceeds to be applied, first, to the payment of the purchase money; second, to the payment of the amount secured to Beall. A

judgment, under the law in force when this cause of Bonson's was determined, is declared to be a final adjudication of a civil action. Under the Revision, § 3121, a judgment is said to be a final adjudication of the rights of the parties in an action. Under § 3123 of the Revision, it is provided that the court may determine the ultimate rights of the parties on the same side, as between themselves, and may grant to any party any affirmative relief which he may be entitled to, and render judgment accordingly, and may render such and so many judgments, joint, separate, and cross, as may be necessary to express the rights of the parties. Granting to the court the full power here given, yet we do not think that it could render a judgment in favor of one defendant against a co-defendant, without such judgment being asked for, and unless there was an adjudication of the claims existing between such parties. Beall did not ask for a judgment against West. The mortgage and note are neither set out in the pleadings. No amount is claimed to be due, nor is there an order that execution issue in favor of Beall for the purpose of enforcing the decree of the court, or to make the amount due out of other property, in case the property ordered to be sold should not sell for a sufficient sum to pay said debt.

In order that the liability of the co-obligors should be merged, as claimed, there should be such a judgment as would give to the holder of the note a full and complete remedy, and that could be enforced against the maker whom he had sought to make liable, and which the defendant could plead in bar to another suit upon the same cause of action.

The cases cited by appellant tend to show that where there has been a judgment against one of several joint makers of a promissory note, the other makers are released by this act of the holder of the note; that the liability of all of the makers becomes merged in such judgment. We do

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not propose to controvert this rule, as we think it not applicable to this case. We assume that there was no judgment in favor of Beall upon the note when plaintiff's action in this case was commenced.

Affirmed.

BLAKE v. THE CITY OF DUBUQUE.

1. **APPROPRIATION OF PROPERTY FOR STREETS: CONDITION PRECEDENT.** Under § 3, chapter 54, Laws of 1853 (An act to amend an act to incorporate the city of Dubuque) and chapter 17, Laws of 1855, a tender of a deed conveying the property appropriated for a street was not a condition precedent to the right of the owner to recover damages. Neither is it essential to show that the city council has, by resolution, declared the street to be opened. It is sufficient to show the confirmation by the council of the action of the jury selected to estimate the damages, in any manner, such confirmation being of record.

Appeal from Dubuque District Court.

THURSDAY, APRIL 10.

PLAINTIFF seeks to recover the value of certain real estate, appropriated by the city for the purpose of extending a street. The errors assigned relate to certain instructions given and refused, for which, see the opinion.

John H. O'Neill and John L. Harvey, for the appellant.

- I. The plaintiff could not recover without tendering a deed of the land alleged to have been taken. The ordinance, § 4, provides that the city shall have deeds of the property taken. Independently of the statute or ordinance, the common law makes the tender of a proper conveyance the condition precedent to the recovery of the purchase

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money. *Benedict v. Weston*, Morris, 490; *School District No. 2 v. Rogers*, 8 Iowa, 316; *Parker v. Parmelee*, 20 John. 130.

II. The city council never laid out or established the street by any order or resolution; the property, therefore, was never appropriated; and plaintiff had no cause of action. *Laws of the Sixth General Assembly*, p. 353.

J. M. Griffith and *W. J. Knight*, for the appellee. 1. There was no issue in the pleadings upon the question of tender, and plaintiff, therefore, was not required to prove such tender. *Frentress v. Mobley*, 10 Iowa, 450. 2. The charter and ordinances require the execution of a deed only upon "the payment of damages." *Laws Fourth General Assembly*, p. 90, sec. 3. 3. It was competent for the city in any other manner than by resolution, in accordance with the ordinance, to ratify the assessment and appropriate the property.

WRIGHT, J. — The appropriation relied upon by plaintiff, took place in October, 1857. At that time, ch. 210, *Laws of 1856-7*, p. 343, was not in force, and with its provisions, therefore, we have nothing to do in the consideration of the questions here involved.

If there was an appropriation of the plaintiff's property, within the meaning of the law and the city ordinances, and if he has performed all the conditions precedent, (if any,) required of him, it is admitted that he is entitled to recover,

And first, as to the condition precedent, we are of the opinion that the court did not err in holding that plaintiff could recover without a prior tender of a deed. No such issue or question was made by the pleadings, nor anything indicating that defendant relied upon such a defense. Waiving this, however, we hold that under sec. 3, ch. 54, *Laws 1853*, ("An act to amend an act to incorporate the city of Dubuque,") and ch. 17, *Laws 1855*, ("An act to amend an act to incorporate," &c.,) a tender of the deed

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before the payment of the damages assessed, was not necessary. Plaintiff's property is taken for public use, and for it he is entitled to a just compensation. When the steps are taken by the city necessary to complete the appropriation, the right to use and control the property is perfect. If he does not appeal from the assessment, he has no election, but must surrender his property and take the damages. These damages the city should offer to pay him before entering upon the land, to use it as a street. Or, if not this, should at least have the same in the treasury set apart for his use, to be delivered upon the making of a deed. If this is not done, and the city enters upon the property and appropriates it in accordance with the purpose of the condemnation, plaintiff may compel the payment of his damages without a tender of a deed.

Whether there was an appropriation of plaintiff's land for the purpose of a street, as claimed by him, was left as a question of fact, to the jury. Upon this subject, defendant asked this instruction: "The plaintiff cannot recover without showing that the city council did, by resolution, declare the street to be opened in accordance with the ordinance." The fourth section of the ordinance referred to, provides, that, if, upon examination of the report of the engineer and assessment, the city council shall decide that it is expedient to lay out, open, or extend the street, they shall proceed to pay the damages, and procure deeds of relinquishment. And then, after providing for the absence of the owner, or his inability to make a deed, it is ordained that they "shall thereupon proceed and by resolution declare such street to be opened, laid out or extended, as the case may be, and a record of the plat, and a description thereof to be recorded," &c. Now, in the first place, we understand the resolution of the council in reference to declaring the street opened, &c., to refer to a time subsequent to the payment of the assessment. And

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if there was an appropriation in fact, of plaintiff's property to the use contemplated, his right to recover the assessment was not dependent upon the passage of a resolution declaring such street open. If the plaintiff assented to the assessment, then the confirmation, by the council, of the action of the engineer and jury selected to estimate the damages, may be shown in any manner which shall be sufficient to express their intent,—such confirmation, of course, being of record.

In this case, plaintiff's assent is shown affirmatively, from the testimony as well as by the institution of this suit; and the failure, by the city, to pass a "resolution declaring the street opened, in accordance with the ordinance," could not defeat his recovery.

Affirmed.

DAVID V. THE HARTFORD INSURANCE COMPANY.

1. **INSURANCE: FORFEITURE BY ADDITIONAL INSURANCE.** A policy of insurance contained the following conditions: "That if the said assured or his assignees shall make any other insurance on the same property, and shall not, with reasonable diligence, give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." The assured thereafter obtained three different policies in different companies, each of which was upon the condition that if the interest insured was a leasehold it should be so stated in the policy, otherwise it would be void. The interest of the assured in the lot upon which the insured property was situated was a leasehold, but that fact was not stated in either of said policies. After the loss, these policies were treated as valid and paid by the companies which issued them. It was held, in an action on the policy containing the condition above set out, that the subsequent policies, so far as the assured was concerned, were valid and binding, and that obtaining them without notice to the defendant was a violation of such condition, and rendered the policy void.

Appeal from Dubuque District Court.

THURSDAY, APRIL 10.

ACTION to recover on a policy of insurance. The facts are stated in the opinion of the court.

Wilson, Uiley & Doud for the appellants.

I. The court erred in instructing the jury as follows: "If you find there was no notice to the defendant of the subsequent insurances, you will then come to the question whether the last policies of insurance were void, for if they were, the plaintiff is entitled to recover, and in this it matters not whether notice was given or not."

1. There was no such issue made by the pleadings, and the jury could determine only the issues of fact. *Parker v. Hendrie*, 3 Iowa, 263; *Brink v. Morton et al.*, 2 Id. 422; *Danforth, Davis & Co. v. Carter & May*, Id. 552; *Vanvalen v. Lapham*, 5 Duer, 689; *Gray v. Fowler*, 5 Sand. 54; *Van Santvoord's Pl.* 416; *Hubler v. Pullen*, 9 Ind. 273; and cases cited, note 1.

2. The only questions at issue were: (1). Did defendant execute the policy sued on? (2). Was there a loss by fire according to the conditions of the policy? (3). Did the plaintiff own sufficient interest in the property to constitute an insurable interest? (4). Did plaintiff procure subsequent insurances, and fail to notify defendant thereof? The questions as to whether or not the plaintiff had complied with the conditions of the subsequent policies, or owned an absolute or leasehold interest in the property insured; or had failed to state the same; or whether facts existed which avoided the policies, were not in issue in the case, and could not be sprung upon defendant at the trial, or passed upon by the jury, and no evidence was admissible in proof thereof under the pleadings. See cases

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cited above; also, *Walters v. Washington Insurance Co.*, 1 Iowa, 404; *Bowen & King v. Hale*, 4 Id. 430; U. S. Digest, Title General Issue, Evidence, vol. 17, 18, sec. 8, p. 443, Title Pleadings; *Jeffrey v. Shalasenger*, 1 Harris, 12; *Haywood v. Harmon*, 17 Ill. 477; *Rose v. Mortimer*, Id. 475; *Manville v. Gay*, 1 Wis. 250; *Bolton v. Cummings*, 25 Conn. 410; *McKyring v. Bull*, 16 N. Y. (2 Smith), 297; *Brazil v. Isham*, 1 E. D. Smith, N. Y. 257; *Hubler v. Pullen*, 9 Ind. 273; *Parker v. Hendrie*, 3 Iowa, 264; *Insurance Co. v. Woodruff*, 2 Dutcher, (N. J.) 541.

II. The court erred in instructing the jury: "If they—the said policies—were void, the plaintiff is entitled to recover, and in this it matters not whether notice was given or not." "A second policy, which is void, does not vacate the first; and the fact that the company who issued the second policy paid the amount insured, is of no consequence in the question here involved, if the payment were made upon a policy clearly void." *Campbell v. The Aetna Insurance Company*, Supreme Court of Nova Scotia, May 31st, 1860; *Bigler v. The New York Central Insurance Company*, New York Court of Appeals, 1861; *Carpenter v. The Providence Washington Insurance Company*, 16 Pet. 495.

III. Plaintiff by his acts has waived any objection to the policies, 19 Barb. 440; 5 Denio, 154; 25 Barb. 189; 4 Foster, 259, 263; Bigler case, as above cited.

IV. The court erred in refusing to give the second and ninth Instructions asked by defendants to the jury, viz.:

2d. "If the jury believe from the evidence that plaintiff was the owner of the property insured, and that his interest was absolute during the continuance of the policies (which plaintiff claims to be void) he must find for the defendant."

9th. "That plaintiff has not produced before the jury sufficient legal evidence to prove that said David, the in-

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sured, did not own the said insured property, absolutely, at the time of the issuing of the said several policies."

Samuels, Allison & Crane for the appellee.

I. The replication denies the allegation of the answer, that the plaintiff did make and procure other insurances upon the property; and thus sufficiently raises the issue tried in this case. 1 Chit. Pl., 512; *Merrick v. Gibbs*, 3 McCord, 815; *Dixie v. Abbott*, 7 Cush., 610; 14 Pick., 803; *Anthony v. Wilson*, 6 Cal., 640; 1 Humph., 12; *Painter v. Weatherford*, 1 G. Greene, 97; *Hildreth v. Tomlinson*, 2 Id., 380, *Walters v. The Washington Insurance Company*, 1 Iowa, 408.

II. The objection comes too late. It should have been urged when the evidence was offered. *Walters v. The Washington Insurance Company*, 1 Iowa, 413; *Woods and Hobart v. Morgan*, Morris, 181; *Sullivan et al. v. Finn*, 4 G. Greene, 544; *Harmon v. Chandler*, 3 Iowa, 150.

III. The subsequent policies were void, and could not operate to avoid the one upon which this action is based. One of their conditions was: "If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." The interest of the insured was leasehold, but was not so expressed in the policy.

1. This condition constitutes a part of the contract. *Ang-Fire Ins.*, p. 52, § 14; *Murdock v. Chenango County Mutual Insurance Company*, 2 Com. 210; *Roberts v. The Same*, 3 Hill, 501; 3 Wend., 94; see, also, *Emerson v. Murray*, 4 N. H., 171; *Duncan v. Sun Fire Insurance Company*, 6 Wend., 494; 9 Barb., 201; 5 Pick., 181; 16 Wend., 395.

2. This condition constitutes a warranty, and must be literally and strictly true; otherwise the policy is void, *ab initio*, and there is no contract between the parties. *Ang*.

Fire Ins., p. 184, §§ 140-143, note 2, and authorities there cited; Pars. Mer. L., p. 519, § 6; 3 Kent, 288; *D. Hahn v. Hartley*, 1 Term R., 345; 1 Doug., 11, note 4; *Burritt v. The Saratoga County Mutual Insurance Company*, 5 Hill, 192; *Jennings v. The Chenango County Mutual Insurance Company*, 2 Denio, 81; *Goix v. Lowe*, 1 John. C., 351; *Murray v. The United Insurance Company*, 2 Id., 171.

IV. A clause in a policy of insurance requiring the insured to give the underwriters notice of subsequent insurances does not render it necessary for the assured, in order to recover on his policy, to give notice of subsequent policies which are void for breach of warranty. *Jackson v. Massachusetts Mutual Insurance Company*, 23 Pick., 423; *Stacy v. Franklin Insurance Company*, 2 Watts & S., 544; *Schenck v. Mercer County Mutual Insurance Company*, 4 Zab., 454; *Philbrook v. New England Insurance Company*, 5 Mo., 145; *Jackson v. The Farmers' Insurance Company*, 5 Gray; *Clark v. New England Fire Insurance Company*, 6 Cush., 347; *Forbrush v. The Western Massachusetts Insurance Company*, 4 Gray, 337.

The counsel for the appellant, in reply to the first proposition, cited *Hogan v. Birch*, 8 Iowa, 312; *Dyson v. Ream*, 9 Id., 52; *Parker v. Hendrie*, 3 Id., 264; *Walters v. Washington Insurance Company*, 1 Id., 404; *Hutchinson v. Langster*, 4 G. Greene, 340; *Bentley v. Bustard*, 16 B. Monr., 686; *Brazill v. Isham*, 2 Ker., 9; *Catlin v. Gunter*, 1 Duer, 266; *Gravey v. Fowler*, 4 Sand., 666; *Seeley v. Engell*, 17 Barb., 537; *Insurance Company v. Woodruff*, 2 Dutcher, 541; *McKyring v. Bull*, 16 New York, 297. To the second proposition, *Walters v. Washington Insurance Company*, *supra*; *Field v. Mayor, &c.*, 2 Seld., 179-189. To the third proposition: 1. If the conditions are regarded as warranties, then the law estops him from denying the truth of such warranties according to their express terms. *Frost v. The Saratoga Mutual Insurance Company*, 5 Denio, 154, and the

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cases there cited; 2 Smith's L. C., 460; 4 Gray, 440; *Roe v. Jerome*, 18 Conn., 188; *Foster v. Newland*, 21 Wend., 94; *Petrie v. Feeler*, Id., 173; 1 Greenl. Ev., § 207; *Hill v. Reed*, 16 Barb., 387; 4 Kent, 261, notes *d* and 1-2. If they are conditions merely, and not warranties, the failure to comply with them at the time, was merely an innocent concealment. *The State v. Richman*, 6 Foster, 232; *Atlantic Insurance Company v. Goodale*, 35 N. H., 328; *Smith v. Saxton*, 6 Pick., 483; *Carpenter v. Providence Mutual Insurance Company*, 16 Pet., 495; *Clark v. New England Fire Insurance Company*, 6 Cush., 645; *Frost v. The Saratoga Mutual Insurance Company*, 5 Denio, 154; *Hale v. The Union Fire Insurance Company*, 32 N. H., 295; *Westlake v. St. Lawrence Mutual Insurance Company*, 14 Barb., 212; *Bouvier's Law Dict.*, "Waiver."

BALDWIN, C. J.—The policy upon which the plaintiff seeks to recover was issued upon the 12th day of May, 1857, and insured the assignor of plaintiff, for one year, in the sum of \$4,000, upon a five-story brick block used as a hotel, and situated in the city of Dubuque. The policy was assigned to plaintiff upon the 20th day of October, 1857, at which time the plaintiff purchased the property insured—valued at \$103,000. The building was destroyed by fire on the 22d day of January, 1858. A condition was inserted in the policy which reads as follows: "That if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." It is claimed by the defendants that they are not liable upon their contract of insurance, as the plaintiff violated this condition of the policy. It appears from the evidence that the plaintiff,

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upon the 6th day of November, 1857, obtained policies of insurance upon said property, in the Charter Oak Insurance Company in the sum of \$5,000; in the Phoenix, of Brooklyn, in the sum of \$2,500; and in the Massasoit, in the sum of \$2,500; and of which the defendants were not notified. It is claimed by the plaintiff, that these subsequent contracts of insurance were void, for the reason that there was a condition annexed to each of said policies, which required that where the interest of the assured was a leasehold interest it should be so expressed in the policy, otherwise the insurance should be void; that the interest of the plaintiff was a leasehold interest; that it was not so stated in the said policies; that each was therefore void, and being void, the plaintiff was not required to give any notice of their insurance to defendant. Under this issue, upon a trial, there was a judgment for plaintiff, and the defendant appeals.

The errors assigned are based upon instructions given by the court on its own motion, and the refusal to give those asked by defendant.

The first instruction given by the court, is as follows: "If you find that there was no notice to the defendant of the subsequent insurances, you will then come to the question whether the last policies of insurance were void, for if they were, the plaintiff is entitled to recover, and in this it matters not whether notice was given or not."

In directing the jury in reference to the subsequent policies, the court said: "A stipulation or agreement in the policy is a warranty, and every warranty must be strictly complied with. A warranty is equally effectual if written upon a separate paper but referred to in the policy itself as a warranty, and the direct asseveration of a fact may constitute a warranty."

The court further instructed the jury: "that a second policy which is void does not vacate the first, and the fact that the company who issued the second policy paid the

amount insured, is of no consequence in the question here involved, if the payments were made upon a policy clearly void."

Several instructions were asked by the defendant and refused by the court. Among others the following: "The said several insurance companies had a right to waive the failure of David to state his interest in the property insured; and if they did waive it, the said contracts of insurance were valid.

"The plaintiff having received the amount of said policies, cannot, in this action, deny their validity.

"If the jury believe from the evidence that the plaintiff has attempted to procure and has procured subsequent insurances on said property, and received payment for his loss by virtue thereof as appears from said policies in evidence, then he has forfeited his contract with defendant, and the jury must so find for the defendant.

"These were voidable, and not void, and the said Insurance Companies could affirm them and waive all objection, and having paid the insurance in full, and the same having been accepted by the plaintiff, he cannot now avoid it, unless he alleges and proves fraud or mistake in the transaction, to his injury or prejudice."

The subsequent policies, or copies thereof, do not appear in the record. The agent of the several companies who issued the same testified that each policy contained the following, as one of the conditions of the insurance: "If the interest in the property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company, and expressed in the policy, otherwise the insurance shall be void."

The record shows that "it was not proved nor was it claimed that the interest of the assured was expressed in either of said policies of insurance." The testimony of the agent shows, however, that the assured represented

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himself as the owner of said property. The plaintiff, upon the trial, introduced evidence tending to prove the interest of the insured but a leasehold interest, and not absolute, as represented in the subsequent policies. It appears from this evidence that the plaintiff had a lease upon the lot upon which the building insured was located; that the lease was to continue for twenty years, and at the expiration thereof, in addition to the annual rent reserved, the lessee was to leave a two-story brick building remaining on said premises. The building insured was built and owned by the plaintiff, at the time of the issuance of the policy by the defendant.

It is true the interest of the plaintiff in the lot was but a leasehold right, but we are not prepared to say that the building insured was not absolutely the property of plaintiff. The lessee was not required by the terms of the lease to leave such a building as the one insured upon the lot at the expiration of the lease. Was it not, therefore, until the expiration of the twenty years, fully and unconditionally the property of the insured? If the plaintiff, therefore, did not misrepresent his true interest in the property insured when he stated it was absolute, there was no violation of the conditions of the policies, and they were not void.

We do not, however, place our conclusions as to the rights of the parties upon this position alone. The jury, however, must have determined that the true interest of the plaintiff was but a leasehold interest, and that the plaintiff, having failed to have this interest truly stated in the policies, could not recover, and placed their verdict upon the ground that each of said policies was absolutely void.

Upon the supposition that the interest of the assured was but a leasehold interest, were these policies void? It must be conceded that upon their face they were each valid subsisting contracts. They were applied for by the plain-

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tiff, and issued by the underwriters in good faith, and with the full understanding that if there should be a loss by fire, the insured was entitled to recover. How, then, could these policies be declared void? We can conceive of no manner in which they could be so held, except by the introduction of extrinsic facts, such as would render it evident that the plaintiff had wilfully and fraudulently concealed his true interest in the building insured, and had done this in violation of the terms of the several policies. This could be done only at the instance of the underwriters, in a suit upon the policies, as the conditions inserted are for their benefit, and not that of the assured. Suppose that the underwriters had refused, after the fire, to pay, and the plaintiff had brought his action to compel them to do so; and suppose, further, that the defendants had set up as a defense the fact that plaintiff had failed to have it stated in the policies that his interest was a leasehold interest, and it should be made to appear that his interest was not absolute, as represented in the policy,—would this defense, if established, bar the plaintiff from a recovery? The plaintiff could have suggested many considerations in reply to this defense. Suppose, for instance, that it could be shown that it was the fault of the underwriters, and not that of the plaintiff, that this interest was not truly stated? Suppose that the insurance had been effected without asking the plaintiff to state what his true interest was? Or, suppose that the underwriters had waived this misrepresentation of the true interest of the assured, and after the policies had issued, agreed to pay in case of a fire? If either of these facts had been established, the plaintiff could have recovered. If so, the policies were not void. We also think that the fact that these several policies were regarded as binding by the insurers, and the losses of plaintiff paid, is a strong presumption, at least, that the policies were not void.

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We, therefore, conclude that these policies were not void. It is true, they might have been avoided by insurers, but so far as the plaintiff was concerned, they were valid, and were so treated by both parties. The plaintiff effected an insurance, therefore, that proved to be an available one, and in doing so, without notice to defendants, he violated his contract with them to such an extent as to forfeit his right to recover.

The condition is inserted in defendant's policy, to protect the company from an over-insurance, without their knowledge. Where property is insured to such an extent that it would be to the interest of the insured that a fire should occur, the hazard is increased and the underwriters should know it. And even if the policies could have been avoided by the underwriters, it was the duty of the plaintiff to notify the defendants of his having effected what he supposed at the time, to be a valid insurance.

We readily conclude that the authorities are somewhat conflicting upon this question, but we believe the cases referred to as favoring the position we have assumed, are placed upon the better reasoning and the true principles of law.

The case of *Clark v. New England Mutual Fire Insurance Company*, 6 Cush., 342, cited by counsel for appellee, is entitled to great consideration, as being the one most similar in its character to the one now before us, made by an able bench, and in which the leading case in support of the opposite position, *Carpenter v. Providence Washington Insurance Company*, 16 Peters, 495, is reviewed, and the reasoning of Justice STORY is endeavored to be refuted. The defendants in this case (*Clark v. The New England Company*,) had a condition in their policy similar to that of defendants. The plaintiff, Clark, subsequent to the date of his policy, effected an insurance in the Bowditch Company upon the same premises, and without notice to defendants.

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After making the policy declared on, Clark mortgaged the premises to secure the payment of \$400; and while the estate was thus incumbered, in the plaintiff's application to the Bowditch Company for an insurance, in answer to this interrogatory, "state whether or not incumbered, and to what amount," replied, in writing, "none." Upon this application, containing this inquiry and answer, the policy of the Bowditch Company was issued.

The court in their opinion, say: "But the question is, was any other insurance obtained, within the just and true import of the section of the act before recited? The policy was issued by the Bowditch Company upon an application by the plaintiff, in which it was distinctly and expressly stated that there was no incumbrance upon the premises insured, when, in fact, there was a mortgage thereon for about \$400. The existence of this mortgage was certainly a material and important fact, not only in regard to the lien of the insurers upon the property, but also as to the ability and responsibility of the insured as to his interest and estate in the premises, and in other respects. But when the insurers desire a fact material, and make an express and direct inquiry as to that fact, it is material that the insured should answer that fact correctly. It is perfectly clear, therefore, that the Bowditch policy was issued upon a material misrepresentation of the insured in his application, and that the plaintiff could maintain no action upon it against that company. *It is an invalid and useless policy.* The defendants now say that their policy is void, because the plaintiff obtained other insurance without giving them notice. But it does not appear, in point of fact, that the plaintiff did obtain other insurance. The plaintiff, it is true, had obtained a policy, but it was not binding in law, and could not be enforced. It was not an insurance, as manifestly understood by the defendants themselves, when they made their policy."

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Let us see how far this case is analogous to the one before us. The Bowditch Company was a Mutual Insurance Company, we suppose, as the court speaks of the existence of the mortgage as a material fact, not only in regard to the lien of the *insurers upon the property*, but of the responsibility of the assured. It was more important to the validity and to the interest of the company that the true interest of plaintiff assured should be disclosed. The assured was directly asked to state the incumbrances, and he replied that there were none. This statement is made a part of the policy. A fraud was, therefore, perpetrated in obtaining the policy. The Bowditch Company never waived this objection to the assured's right of recovery, and did not pay any loss to the plaintiff in that case. There was no double insurance obtained in that case, and the defendants could not claim that they were liable to pay only ratably.

Was the plaintiff in this case asked to disclose the interest he had in the property insured? Did he obtain the insurances upon any false representations? Was it not an available insurance to him? Did it prove to be really and in fact no insurance? Were not his subsequent policies binding, and could they not be enforced? The answers to these inquiries are disclosed by the record, and show the distinction between the two cases. The case of *Jackson v. The Massachusetts Mutual Fire Insurance Company*, 23 Pick., 418; and *Stacy v. Franklin Insurance Company*, 2 W. & S., 506, are cited by the court in their opinion in the above case as authority for its conclusions, and each is relied upon by the counsel for the appellee in their argument. None of the cases referred to that we have been able to examine, support the ruling of the court more strongly than the case from 6 Cushing.

The case of *Carpenter v. Providence and Washington Insurance Company*, 16 Peters, 496, and *Bigler v. New York*

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Central Insurance Company, New York Court of Appeals, are each cited by counsel for defendants in this case.

In the case of *Carpenter*, *supra*, STORY, J., in delivering the opinion of the court says, "The second instruction asked, proceeds upon the ground that although the policy of the 'American Insurance Company' was good upon its face, yet if in point of fact it was procured by material misrepresentation by the owners, of the cost and value of the premises insured, it was to be deemed utterly null and void, and therefore as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of the underwriting the policy declared on. The court refused to give the instruction, and, on the contrary, instructed the jury, that if the policy of the American Insurance Company was at the time when that at the Washington Insurance Office was made, treated by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided, but was still held by the assured as valid, then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void. We are of the opinion that the instruction as asked was properly refused, and that given was correct. It is not true that because a policy is procured by misrepresentation of material facts, it is therefore to be treated in the sense of the law as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters upon the proof of the facts; but until so avoided, it must be treated for all practical purposes, as a subsisting policy. * * * * But the question is not how the policy may now be treated by the parties, but how was it treated by them at the time when the policy declared on was made. It was then a subsisting policy, treated by all the parties as valid, and supposed by the underwriters to be so. * * * * And it may be well doubted whether a party to a policy can be allowed

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to set up his own misrepresentations to avoid the obligations deducible from his own contract. Be this as it may, it is in our judgment free from all reasonable doubt, that notice of a voidable policy must be given to the underwriters, for such a case falls within the meaning of the stipulations in the policy. It is a prior policy, and has a legal existence until avoided. Indeed, we are not prepared to say that the court might not have gone further, and have held that a policy existing and in the hands of the insured, and not utterly void upon its face, without any reference whatever to extrinsic facts, should have been notified to the underwriters, even though by proofs afforded by such extrinsic facts it might be held in its very origin and concoction a nullity."

This policy of the existence of which the court thus held that notice should have been given to the underwriters, was obtained through false representations, and was held to be utterly void. 1 Story, 57.

In the present case there is nothing to show that the policies were void on their face, and the extrinsic evidence fails to show that they were obtained by any false representations, or that the underwriters had ever taken any steps to avoid them. They were treated by the parties when made as valid subsisting policies, and then and afterwards treated by the underwriters as such.

The case of *Bigler v. The New York Central Insurance Company*, *supra*, is of recent authority, and the facts stated show the case to be very much like the one now before us. The plaintiff in that case having been insured in the New York Central Company, the policy containing the same conditions as in that of defendant in this case, subsequently effected an insurance in the Globe Insurance Company upon the same property, in which there was a condition that if the insured had already any other insurance not notified to the said Globe Company, and indorsed upon

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their policy, it was to be void. The court in their opinion by DAVIES, J., say: "The plaintiffs to enable them to maintain their action against these defendants, now take the ground, that in fraud of this agreement with the Globe Company they concealed from them the fact of the prior insurance with defendants, and that such concealment rendered the Globe policy void. They say, therefore, they had no further or other insurance on the same property, and had not violated their agreement in that regard with these defendants. In assuming this position, they overlook the fact that this agreement or stipulation was made for the benefit of the Globe Company, and that it was competent for that company to waive it. It would appear that in the suit brought by these plaintiffs against that company, its liability on the policy was acknowledged, and a draft given to pay the amount of the loss. Both parties to the policy therefore treated it as a valid, subsisting instrument, and it will not answer for these plaintiffs now to shift their ground, and set up that this policy is void, and was so from the time it was issued, by reason of their fraudulent concealment of the fact of their prior insurance. But the agreement between the parties to this action was, that the policy of defendants was to cease and be of no further effect if the plaintiffs thereafter should make any *other insurance* upon the same property, &c. It was the act of making another insurance which was to vitiate and render null the defendant's policy. We think it no answer for plaintiffs to make to allege that the other insurance might legally have been resisted and avoided. This was not what the parties had agreed to. * * * * We are not at liberty to make a new contract for the parties, but to inquire whether the one that was made has been violated."

The court in this case refer to and adopt the views of STORV, Justice, in the case of *Carpenter v. Washington Insu-*

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rance Company, and review some of the cases cited in support of the position of appellee. In referring to the case of *Philbrook v. The New England Mutual Fire Insurance Company*, cited by the counsel for appellee. Justice DAVIES says: "In that case the underwriters of the second policy paid the amount of the loss, thus directly affirming the policy, and admitting their liability on it. Yet the court say, the fact that the company who issued the second policy paid the amount insured is of no consequence in the question here involved, if the payment was made on a policy clearly void. Whether or not the policy was void, depended on the action of the underwriters. It was competent for them to waive, at any time, the forfeiture incurred by reason of the omission to give notice of a prior insurance, or of any fraud or misrepresentation existing at the time of the issuing of the policy. This waiver could as well be made after loss as before, and payment of the loss is the best evidence that the underwriters of the second policy did in fact make the waiver. It was therefore a case where both parties treated the policy as valid and subsisting; the insured by making the claim for the loss under the policy, and the underwriters by admitting their liability, and making payment. That policy was treated by the parties as a valid and legal policy, and effectual and binding upon the assurers. It came, therefore, directly within the class of policies referred to by the Supreme Court of Massachusetts in the case in 23 Pick., and was in this view a second insurance. We adopt the language of the court in that case, and agree with them that such second insurance would annul the previous policy."

The case of *Jacobs v. The Equitable Insurance Company*, see 19th Upper Canada Reports, is an analogous case, and strongly supports the view we have taken of this question.

It is claimed by counsel for appellee that the ruling of this court in the case of *Hygum v. The Aetna Insurance*

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Company, 11 Iowa, 21, is favorable to the ruling of the court below. We do not regard our conclusions in this case as in conflict with that decision. The Dubuque company, in that case, denied the validity of their policy, and did not waive the violation of its conditions. This alone, if in no other respect, shows that the cases are dissimilar.

The instructions asked by counsel for defendants, so far as they are consistent with this opinion, should have been given. The court erred in its instruction to the jury.

Reversed.

LANGWORTHY V. THE CITY OF DUBUQUE.¹

1. REVENUE: CASE FOLLOWED. *Morford v. Unger*, 8 Iowa, 82, as to the power of a city to tax agricultural lands, re-affirmed.
2. SAME: ESTOPPEL. Mere submission on the part of the citizen, except in extreme cases, to an illegal levy of taxes will not be construed into a recognition of the right to the extent of estopping him from subsequently denying it.

Appeal from Dubuque District Court.

THURSDAY, APRIL 10.

COMPLAINANTS seek to restrain the city from collecting certain taxes levied upon their lands for the year 1858. The lands assessed are outside the corporate limits as fixed by the "Act of February 24, 1847," but included by the amendatory act of January 22, 1853, (p. 89.) The right of the city to tax this character of property is the question involved.

¹ The following opinion determines two cases, each bearing the above title. S. M. Langworthy was the plaintiff in the one, and E. Langworthy was the plaintiff in the other.

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John H. O'Neill and *John L. Harvey* for the appellants, contended that *Morford v. Unger*, 8 Iowa, 82, differed from these cases in several particulars: 1. In that case the act enlarging the city limits was approved July 14, 1856; and the question as to the right of the city to tax was raised upon the first levy thereafter, to wit, in 1857, while in these cases the act was passed in 1853, and complainants continued to pay city taxes until 1858, without resistance, and without any attempt to try the city's right to make the levy. 2. In that case the property consisted of one hundred and three acres of land used exclusively for farming purposes, and about one mile from the old city limits, and about the same distance from any land laid out as town lots; while in these cases the land is much nearer the old city limits, and a portion of it has been laid out into town lots.

Wilson, Utley & Doud for the appellees, argued the evidence elaborately, and contended that these cases are within the doctrine of *Morford v. Unger*, 8 Iowa, 82, and *Whiting v. The City of Mount Pleasant*, 11 Iowa, 483. To the point that plaintiffs were not estopped by acquiescence in the levy of the tax, they cited *The City of Cincinnati v. Combs et al.*, 16 Ohio, 181, and *The Bank of Chillicothe v. The Town of Chillicothe*, 7 Ohio, pt. 2, pp. 31-35.

WRIGHT, J.—The labor of counsel in these cases has been fully equal to their importance to the city and parties sought to be taxed. By the amendatory act the city limits were increased some 6,000 acres, and we are to determine whether the lands thus included, of the character and description specified in the petitions of complainants, (for these are two cases each involving the same question,) can be taxed by the corporation.

The question might be greatly elaborated, but, in our

opinion, it is so fully and satisfactorily settled in the case of *Morford v. Unger*, 8 Iowa, 82, that further argument could not make it clearer. We think it very manifest from the report of the master, which is fully warranted by the testimony, that these lands were not necessary for city purposes; that they were not lots, nor outlots, but lands used for mining, horticultural, grazing, farming and other similar purposes; that the sole object in bringing them within the city limits was to increase the city revenue that complainants did not, nor did they propose to lay the same off into lots, or invite purchasers to settle upon and occupy them, and that the effect of the legislation, if sustained, would be to subject their property to public use, without just compensation. True, there is some testimony tending to show that complainants voted at the municipal election, that they paid taxes on their property, assessed in 1857 and prior years, (but not always without entering their protest) and prayed for improvements, some of which were granted, and others not. But we do not think that any nor all these considerations combined, should estop them from contesting the right of the city to tax this property. Aside from some positive and affirmative act of the parties upon which the city relied, and was induced to act to its prejudice; the complainants would not be concluded. The right to property is a vested one. The power to tax it belongs alone to the legislative arm of the government, or local municipal organizations acting under the power given by the legislature. This power, while it is, when properly exercised, to be unreluctantly obeyed, yet operating as it does upon this vested right, it should be watched with jealous care, and if illegal, mere submission on the part of the citizen to this "one arm of the tremendous power of *eminent domain*," should not, except in an extreme case, be construed into a recognition of the right, to the extent of estopping him from subsequently denying it. And more

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particularly is this so, when parties are under the impression that they are without remedy, and in ignorance of their rights in the premises.

We see no reason for disturbing those decrees, and they are therefore affirmed.

KARNEY V. PAISLEY.

1. **WITNESS: COMPETENCY OF THE WIFE.** Under § 3983 of the Revision of 1860, the wife is not a competent witness for the husband; and her statements are inadmissible in evidence for the husband.
2. **SAME: CONSTITUTIONAL LAW.** The Legislature has power, under § 4, art. 1 of the Constitution, to provide that a person interested in the event of a suit shall not be a competent witness therein.
3. **EVIDENCE IN SLANDER.** In an action of slander the plaintiff may show the pecuniary condition of the defendant in aggravation of damages; and the defendant may be permitted to show the same in mitigation of damages.
4. **INSTRUCTIONS.** Instructions in slander considered.

Appeal from Dubuque District Court.

THURSDAY, APRIL 10.

ACTION for words charging the plaintiff with larceny. The defendant appeals. The material questions raised in the trial below are stated in the opinion of the court.

Samuels, Allison & Orane for the appellant. (No argument on file.)

Wilson, Uiley & Doud and *O'Neill & Harvey* for the appellee.

I. What was said and done when the words complained of were spoken is admissible for the purpose of showing

the feeling which actuated the defendant. *McClintock v. Orick*, 4 Iowa, 453; 3 Am. L. C., 203; 3 Phil. Ev., 559; 2 Greenl. Ev., § 418.

II. The court properly excluded the testimony of the defendant's wife. Section 3983 of the Revision of 1860. The evidence of the wife, as to seeing a gold piece drop from the person of the defendant, was not admissible under the plea of justification, because it was hearsay and incompetent. *Bush v. Prosser*, 1 Ker., 347; *Larned v. Buffington*, 3 Mass., 553; *Root v. King*, 7 Cow., 613; S. C., 4 Wend., 114; *Bisby v. Shaer*, 2 Ker., 67; 1 Am. L. C., 199; *Casper v. Barber*, 24 Wend., 105; *Williams v. Miner*, 18 Conn., 464; *Purple v. Horton*, 13 Wend., 9; 2 Greenl. Ev., § 275; *Snowden v. Smith*, Maule & Selwyn, 287.

III. In an action of slander the plaintiff may give in evidence the pecuniary circumstances of the defendant. *Hostey v. Brooks et ux.*, 20 Ill., 115; *Fry v. Bennett*, 4 Duer, 247. The assessment roll was properly admitted in evidence to show the pecuniary circumstances of the defendant. 2 Dev., 63; 1 Phil. Ev., 387, note 109; see also *Bennett v. Hyde*, 6 Conn., 24; *Jackson v. Stetson et al.*, 15 Mass., 55; *Renkendorff v. Taylor*, 4 Pet., 349.

IV. The first instruction was too indefinite, and was properly refused.

V. When words are actionable, the law implies malice, and the fact that defendant honestly believed them true will not screen him from a verdict for the actual damage caused by his mistake. *Prosser v. Brommage*, 4 Barn. & Cres., 247; *Shaw v. Sweeney*, 2 G. Greene, 587.

LOWE, J.—A slander case, in which the plaintiff prevailed and the defendant seeks a reversal of the judgment against him, upon several grounds of alleged error.

The first demanding attention is, that his wife, Margaret, was not permitted to testify in his behalf. Section 3983 of

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the Revision of 1860 excludes her. But it is said this statute is inoperative, because in conflict with the fourth section of the first article of the Constitution. This, we think, is a misconception. There is nothing in the section of the Constitution referred to that takes from the General Assembly, the power to declare that interest in the event of a suit shall disqualify or shall not disqualify a witness, according as it shall in its wisdom think best. If, in the exercise of this power, it is competent for the Legislature to declare that interest in the result of a suit shall not disqualify, we suppose it falls equally within the scope of its powers, to restrict, if it thinks proper, a general enactment of this kind, and to say that while interest generally shall not disqualify, a special or peculiar interest, that which, for instance, results from the intimate relations of husband and wife, shall have that effect. And this is just what the Legislature has done in the section of the Code above specified. To hold that it is in conflict with the provisions of the Constitution, is to hold that the language of the section therein named *ex vi termini* precludes all legislation touching the competency of witnesses arising from interest. No such purpose as this, we think, was contemplated by the framers of that instrument. They did intend to guard against religious sentiment or belief of any and every shade being made a test of competency to testify; and it is very possible by the latter clause of the same section they intended to secure the competency of witnesses against other objections ordinarily made; but we think it quite clear that objections founded upon the interest of the witness were left where they always have been, under the control of legislation.

It seems scarcely necessary to allude to a kindred question made a distinct ground of error, namely, the incompetency of the husband to testify to the declaration of the wife. Besides the objection upon the score of hearsay and

identity of rights and interests between the husband and wife, it would seem to follow, as a necessary conclusion, from the incompetency of the wife to testify for her husband under the sanctions of an oath, that her unsworn declarations could not be proved by a third party, and in that way be made evidence.

II. Against the objections of the defendant, the plaintiff on trial was permitted to show the condition of the defendant in point of property and pecuniary circumstances. It is still insisted that the objection was well taken. But to do so, in order to aggravate damages and also to allow the defendant to show his limited means, to mitigate damages, has been a rule of practice so frequently established and followed by the courts that we have no disposition to change it. Experience has not shown the propriety of abolishing such rules upon the ground that they are liable to abuse. It is always in the power of the court, in its instructions to the jury, to guard them against an improper use of such evidence, as we think was very fairly done by the court in its charge to the jury in this case. 20 Ill., 115; 4 Duer, 247; 6 Conn., 24; 3 Mass., 546.

III. The court refused the first, fifth, eighth and eleventh instructions asked by the defense, to which exceptions were made. The first of these instructions is as follows:

"If from the evidence the jury believe that the plaintiff told the defendant she had got the money from her mother, and that if her mother did not say so, she (plaintiff) would give up the money to him, then it is no slander for the defendant to see her mother, tell her what had occurred, and ask her if she had let the plaintiff have the money."

The objection to this instruction is its vagueness. What is meant by the words, "*tell her what had occurred?*" The evidence shows that quite a good many things had occurred before the defendant had his interview with the mother of the plaintiff. He had among other things accused her of

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stealing the money and property in question, in the presence of third persons, and stated that he had missed gold coin from his drawer, and that his wife had seen her drop and pick up a gold piece of coin. She denied the charge, said she had got the money of her mother, &c. Now, if he had told all that had occurred to the mother, it would, it seems to us, be slander, if untrue. If he simply asked the mother whether she had at any time let her daughter have a piece of gold coin to the value of five dollars, remarking that there had been a question of dispute between himself and her daughter, this would be a different affair, and would not amount to slander. But how could a court safely give an instruction so indefinite in its terms?

The fifth and eighth instructions refused may be included substantially in the following proposition: "That if the defendant honestly believed that the plaintiff had taken the money, that this was a circumstance which the jury might consider in judging of the motive, and determining the case, even under the plea of justification." The object of these instructions was to give to the defendant the benefit of the fact stated, (if it existed,) as a mitigating circumstance which in law should reduce the amount of the damages. Conceding this to be the right of the defendant, yet, if the court had in his main charge to the jury given substantially these instructions, he was not bound to repeat them in different language at the instance of defendant's counsel. Indeed, the court below discussed in his charge to the jury the very proposition contained in these instructions, quite at length. Among other things, the court said: "The words 'mitigating circumstances sufficient in law to reduce the amount of damages,' are not to be construed as meaning mitigating circumstances legally admissible in evidence, for if so it would leave the law as it was before, so far as the admission of mitigating circumstances are concerned; but it must be considered as referring to such circumstances

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as tend to show an honest motive on the part of the defendant, and the absence of malice, for instance, that although mistaken, he believed the truth of the charges," &c. This instruction of the court will be better understood when it is remembered that it was given with reference to the provisions of the Statute, contained in § 2929 of the Revision of 1860.

So, also, with reference to the eleventh instruction. It was substantially covered by the tenth, which had just been given. This makes it unnecessary to re-state the instruction, and to suggest some additional reasons why it could be properly refused.

A motion for a new trial was overruled, founded upon the foregoing assigned errors, and for the additional reason that the verdict was contrary to the evidence.

It is confessed that the evidence to our minds is not very satisfactory, yet it does not fall within the familiar rule, which we have repeatedly established for disturbing the judgment below for such a cause.

We are not satisfied, in the condition of the record, that the defendant has been prejudiced by the rulings of the court below, or that a different result would likely be reached by granting a new trial, and therefore the judgment is

Affirmed.

SMITH v. HEWETT.

1. HUSBAND AND WIFE: POSSESSION OF PERSONAL PROPERTY. Under § 2499 of the Revision of 1860, personal property in the common use and joint possession of the husband and wife, is *prima facie* under the control of the husband, and is subject to his debts to third persons. The wife can protect herself only by a compliance with the provisions and requirements of the section above mentioned.

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Appeal from Dubuque City Court.

THURSDAY, APRIL 10.

THE facts are stated in the opinion of the court.

Cooley, Blatchley & Adams for the appellant.

Bissell & Shiras for the appellee, cited Revision of 1860, § 2499; 38 Penn. S. R., 277.

LOWE, J. — This is a controversy touching the right of property to certain pictures and articles of household furniture set up by plaintiff under the following circumstances: John B. Smith, husband of plaintiff, and Mrs. Kingman, his mother-in-law, were the keepers of the Julian House in the city of Dubuque. By them the property in dispute had been mortgaged. After foreclosure, the defendant with a special execution under the decree levied upon the same, and it was replevined by the plaintiff, wife of the said J. B. Smith, as her own separate property, under her exclusive control and possession. The proof showed that most of the property had been given to her by her father in the year 1854, and a few articles by her husband in 1858; that at the time of the levy aforesaid, it was found in rooms No. 63 and 64 of said house, which were occupied by Smith and his wife, the plaintiff, and Mrs. Susan Kingman, the mother-in-law, who used and possessed the property in common, or conjointly. The record presents no evidence that the defendant or the plaintiff in execution had actual or constructive notice of her ownership. On trial, among others, the following instructions were given by the court to the jury:

1. "If the wife becomes possessed of personal property, either by gift or otherwise, and permits the same to pass under the control or into the possession of her husband, and does not file any notice of her claim in the recorder's office

of the county, such property is liable to be taken on execution against her husband."

2. "Where household furniture, pictures, and the like property are used in the house occupied by the husband and wife, such property is considered as being in the possession of the husband, and under his control." This last given with the additional remark: "But while this is the general rule and presumption, the question as to who had the control of the property is one for the jury to determine by the evidence under all the circumstances of the case."

The trial resulting in favor of defendant, the plaintiff makes the foregoing instructions the ground of her appeal, insisting that it was error to have given them.

The rule that "if two persons be in the joint possession of property, and one alone has the title, the law will refer the possession to the title," (17 Ala., 566; 3 J. J. Marshall, 280,) has no application under sections 2499, 2500, 2501, 2502, 2503, of the Revision of 1860, to persons standing to each other in the relation of husband and wife. Indeed, such a rule, if recognized, would abrogate in effect the provisions contained in these sections, which seem to be founded upon the idea that personal property in the common use and joint possession of husband and wife *prima facie* is, from the very nature of their relation to each other, under the control and ownership of the husband, and subject to his debts by third persons without notice. If the property in fact belongs to the wife, she can only protect herself from these consequences, by bringing herself within the provisions of the above sections of the Revision, which it is conceded she did not do.

Notice of her ownership was required to be filed for record with the recorder of deeds of the county. In the absence of this, and any proof of actual notice, we do not perceive why the above instructions are not a fair expo-

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sition of the law applicable to the facts of this case.
Judgment below

Affirmed.

BAILEY V. THE DUBUQUE WESTERN RAILROAD COM-
PANY *et al*

1. JUDGMENT: SUPPLEMENTAL PROCEEDINGS. An order that an execution shall issue against a corporation with a clause inserted therein directing that it shall be levied upon the property of certain stockholders, does not render such stockholders judgment debtors "within the meaning of chapter 126 of the Revision of 1860," and they cannot be compelled, after the return of such an execution, to disclose property in the summary manner provided by said chapter.

Appeal from Dubuque District Court.

THURSDAY, APRIL 10.

THE facts are stated in the opinion of the court.

Wilson, Uiley & Doud for the appellants, contended that *Pelan* and *Anderson* were not judgment debtors of the plaintiff and appellee, within the meaning of chapter 126 of the Revision of 1860, and cited *Monell's New York Practice*, 342, 347; *Jones v. Lawlin*, 1 Sand. Sup. Ct. R., 722; *Sales v. Lawson*, 4 Id., 718; *Conway v. Hitchins*, 9 Barb., 378; *Ross v. Cheesman*, 9 Sand. Sup. Ct. R., 676, 680.

Thomas M. Monroe for the appellee, contended that the appellants are the judgment debtors of the appellee.

BALDWIN, C. J.—The plaintiff obtained a judgment against the Dubuque Western Railroad Company, upon which an execution issued, and which was returned no property found to satisfy the same. A proceeding was

then had against Pelan and Anderson, as stockholders of said company, to make them responsible to plaintiff for the amount of their unpaid installments of stock, and to subject their private property to be levied upon in satisfaction of the plaintiff's judgment. In this proceeding the District Court rendered the following order: "That the said Jesse B. Bailey have execution against the said Dubuque Western Railroad Company for the sum of eight hundred and eighty-five dollars, with interest and costs, &c.—with a clause inserted in said execution directing that it shall be levied on the property of said Pelan and Anderson, to satisfy said execution and costs," &c.

Upon this an execution issued, and the plaintiff filed his petition under the provisions of chapter 126 of the Revision, to compel Pelan and Anderson to disclose certain property which it was claimed they had, but which could not be discovered by the officer holding the writ. To this proceeding Pelan and Anderson objected, and moved that they be discharged from the order of the court, requiring them to answer, &c. This motion being overruled, and a referee being appointed to take their answers, they appeal.

The question presented is, whether Pelan and Anderson are judgment debtors within the meaning of §§3375-76 and 78, under which the plaintiff seeks to compel them to answer. If so, they are compelled to answer, if they are not, they should have been discharged.

The appellants were stockholders in the corporation against which the plaintiff had obtained judgment, and under the provisions of §1172 of the Revision were individually liable to the amount of the unpaid installments owned by them, and an execution against the company to the extent of such unpaid stock could be levied upon their private property. Proceedings were had by plaintiff to determine this amount, and the order above stated was made.

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Judgments or orders requiring the judgment of money, &c., are to be enforced by execution. See § 3247 of the Revision. There must be an order to this effect in the judgment, before an execution can issue. In the judgment upon which plaintiff bases this proceeding there is no such order. It will be observed, from the wording of the judgment, that the order of payment is against the corporation, and that, in the execution to be issued, there is a clause to be inserted directing a levy upon the property of appellants. Without a judgment or order against appellants, they do not become judgment debtors.

This was the objection made by the appellants in their motion in the court below, and, not being judgment debtors, they were not liable to answer.

Reversed.

TERHUNE V. HENRY & CARMICHAEL.

1. **WITNESS: ADMINISTRATOR COMPETENT.** In a proceeding in the Probate Court to enforce the payment of a claim against the estate of a decedent, the executor is a competent witness as to facts which occurred after the death of the deceased. Rev. of 1860, § 3980; *Romans v. Hays' Administrator*, 12 Iowa, 270.
2. **EVIDENCE AND INSTRUCTIONS.** The sufficiency of evidence tending to show fraud in obtaining a check, as a basis for an instruction, considered.
3. **EVIDENCE: PLEADINGS: EXECUTION OF NOTE.** Under chap. 108, Laws of 1853, the supposed maker of a bill or note may prove that it was not his deed. The burden of proving the execution can be placed upon the holder only by a sworn denial. Following *Lyon v. Burna*, 6 Iowa, 48.

Terhune v. Henry & Carmichael.

Appeal from Scott District Court.

THURSDAY, APRIL 11.

THE facts are stated in the opinion of the court.

Grant & Smith for the appellant, cited *The School Inspectors v. Hughes*, 24 Ill., 231.

Cook & Drury for the appellee, relied upon *Ruble v. McDonald*, 7 Iowa, 90; *Jourdan v. Reed*, 1 Id., 135; *Freeman v. Rich*, Id., 504; *The State of Iowa v. Tomlinson*, 11 Iowa, 102; *Mann et al. v. Clifton*, 3 Blackf., 304; *Johnson v. Moulton*, 1 Scam., 532; *Smith v. Schultz*, Id., 491; *Sullivans v. Dollins*, 13 Ill., 85; *Lehigh v. Hodges*, 3 Scam., 15; *Bloomer v. Denman*, 12 Ill., 240; *Loury v. Orr*, 1 Gil., 70; *Dawson v. Robins*, 5 Id., 72; *Wheeler v. Shields*, 2 Scam., 348; *Kincaid v. Turner*, 2 Gilman, 618; *Douglass v. Tousey*, 2 Wend., 352; *Griffith v. Welling*, 3 Binn., 317; *Cain v. Henderson*, 2 Binn., 108; *Campbell v. Sproat*, 1 Yates, 327.

BALDWIN, C. J. — This was a proceeding to establish a claim in the Probate Court against the estate of one Carmichael, deceased. Upon the trial in the District Court, one of said executors was introduced by defendants and permitted to testify as to certain facts as occurring after the death of deceased. This ruling is the first error assigned. It has been held by this court in the case of *Romans v. Hays, Admr.*, 11 Iowa, 270; that section 3980 of the Revision affects only the competency of the party or person in whose behalf an action is brought against an administrator of a decedent. Upon the authority of this case we hold that the court did not err in the admission of this testimony.

It is next assigned as error, that the court erred in its instructions to the jury. The claim of plaintiff is founded upon a check signed by the deceased. The defendants in their answer deny that the deceased ever executed and delivered to the plaintiff the check sued on. Under this issue the defendants introduce evidence which, it is claimed, tends

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to prove that notwithstanding the check was signed by deceased, that it was so signed for another and different purpose than that of being evidence of any indebtedness to plaintiff. It is claimed, in the defence, that the deceased was a railroad contractor; that the plaintiff was employed as his clerk; that checks were signed in blank by deceased and placed in the hands of plaintiff that he might settle with and pay off persons employed by deceased; that the check sued on came into the possession of the plaintiff in this manner; that it was signed in blank by deceased, but was filled by plaintiff, wrongfully and without the knowledge or consent of deceased, and for an amount not owing to plaintiff. The court instructed the jury that if they should believe from the evidence that the plaintiff had the check sued on in his possession, with the name of Carmichael signed thereto, but not filled up as to amount, date or payment; and being so possessed of the check thus signed, the plaintiff afterwards filled out said check in his own name, and without authority from Carmichael, and without consideration, the plaintiff cannot recover.

It is objected that there is no evidence to justify such an instruction, and that it tended to mislead the jury. We do not regard this objection as well taken. The maker of the check being dead the defense made must, as a matter of necessity, be established by circumstantial evidence. Many circumstances are detailed in the testimony which certainly do raise some violent presumptions of fraud by the plaintiff. The fact that a person would hold a check for such a large sum of money for eighteen months without presentation, is not without some significance. The fact that in the frequent interviews with the executors, in speaking of the claim of plaintiff for services, the check is never named, for nine months after made, the alteration in the date of the check, and the check-book and the tabs therein, as offered in evidence, each tend to show the jury that the claim of

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plaintiff was a fraudulent one. We are inclined to the conclusion that the instruction as given was not wholly hypothetical, as is claimed, but the facts as detailed justified the instruction as given.

The court, in connection with the foregoing instruction, directed the jury that the existence of the check, filled up and signed by the maker, is *prima facie* evidence of its being genuine, and that this presumption must be rebutted by the supposed maker, by proof that it was filled up without his knowledge or consent. With this qualification by the court, we do not think the jury could have been misled, as the law is correctly and clearly stated.

It is further claimed that there was no issue to justify the instructions given. The answer was not sworn to. It merely denies that the deceased ever executed and delivered the note sued on.

We do not understand that under the act of 1853, chap. 108, referred to by counsel, it is required of the supposed maker of a bill or note to deny, under oath, its execution, before he can plead or prove that it was not his deed. We understand this law to declare, that where the execution of a note or bill is not denied, the holder in his action is not required to prove the signature, before he can introduce such note in evidence.

If the execution is denied, under oath, the burden of proof is thrown upon the holder. But the defendant may, without answering under oath, deny such execution, and support his answer by proof. See *Lyon v. Bunn*, 6 Iowa, 48.

Affirmed.

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1. **ORDER OF EVIDENCE.** The Supreme Court will not interfere with the exercise of discretion by the District Court, as to the order in which evidence is introduced, except in cases of manifest abuse.
2. **OBJECTION SHOULD BE MADE BELOW.** An objection to the form of an interrogatory addressed to a witness, which was not presented to the court below, will not be considered by the Supreme Court.
3. **EVIDENCE: IMPEACHMENT: DEPOSITIONS.** When two different depositions of the same witness have been taken in the same cause, the first one taken cannot be introduced for the purpose of impeaching the second, when no foundation was laid in the second deposition by calling the attention of the witness when such second deposition was taken to the statements made in the first, for the purpose of affording him an opportunity to confirm or explain the same. A general statement in the second deposition that when the first was taken the witness was sworn in the usual form, and that his testimony was then correctly written out by the officer, is not sufficient.

Appeal from Lee District Court.

FRIDAY, APRIL 11.

PLAINTIFF sues in *trespass*, claiming \$4,000 for certain goods and chattels, with force, &c., taken and carried away by defendants. The defendant justifies, under a writ of attachment against one Louis Baum. It is also averred that Baum owned the goods, and sold the same to plaintiff, with intent to defraud his creditors, &c. Issue thereon, trial and verdict for plaintiff, and defendants appeal.

Samuel F. Miller and *J. M. Beck*, for the appellant, each presented an oral argument, in addition to one printed, in which the following authorities were cited: 1 Starkie's Ev., 183, note 1 (marg.); 2 Phill. Ev., Cow. & Hill's Notes, 962; *Downer et al. v. Dana et al.*, 19 Verm., 344; *Cowden v. Reynolds*, 12 Serg. & R., 288; *Olapp v. Wilson*, 5 Denio, 285; *Pickard v. Collins*, 23 Barb., 456; *Williams v. Chapman*, 7 Ga., 467; *Drew v. Wadleigh et al.*, Id., 467; *Pearce v. Furr*,

Smedes & M., 47; *Crowley v. Page*, 7 Car. & P., 689; *Ware v. Ware*, 8 Maine, 29; *Tucker v. Welsh*, 17 Mass., 160; *French v. Merrill*, 6 N. H., 465; *Judson v. Blanchard*, 5 Conn., 557.

Daniel F. Miller for the appellee, in an oral argument, cited the following authorities: 3 G. Greene, 580; 8 Iowa, 451; Walker's Ch. R., 48; *Gres. Eq. Ev.*, 141, 12 Georgia, 450; 20 Ohio, 87; 3 Duer, 421; 19 Wend., 487; 19 N. Y., 549; 12 Ala., 131; 19 Id., 581; *Conrad v. Griffey*, 16 How., 89; *Morrison & Myers v. Turner et al.*, 11 Iowa, 538.

WRIGHT, J. — Two questions are presented for our consideration.

I. Defendants read in evidence the deposition of one Rosenstien, in which, in reply to an interrogatory, the witness detailed a conversation with one Adolph Samuel, (brother of plaintiff,) in presence of plaintiff, which tended to show that the transaction through which plaintiff claimed title to the goods, was fraudulent. In rebutting, plaintiff was called, the said answer read to him, and he was then asked whether such "conversation ever took place in his presence or hearing." To the reading of this answer and the interrogatory, defendants objected. The objection was overruled. After this, and when the bill of exceptions embodying the facts had been prepared and presented to the court for signature, plaintiff's attorney asked leave to withdraw the question and answer, recall the witness, read the same answer, and ask the witness what he had to say in reference to that conversation. This was permitted, and the witness allowed to answer. To all this defendants excepted. It is certified that the court understood the objection, in the first instance, to relate to the reading of the answer to the witness, rather than the form of the interrogatory. And this action is the first matter assigned as error.

It may be admitted that the course of examination allowed, is not in accordance with good practice. And yet we cannot believe there was any such abuse of the large discretion wisely lodged with courts, in controlling the manner of introducing testimony, as to justify our interference. It is worthy of remark, that while in this court it is urged that the interrogatory, both before and after the preparation of the bill of exceptions, was leading, no such point was made in the court below. The objection cannot, therefore, avail. (*Foley v. Adams*, 4 Iowa, 44; *Mills et al. v. Mabor*, 9 Id., 484.) Not only so, but the certificate of the judge, as to this understanding of the facts, and the character of the objection, removes all possible difficulty.

II. Plaintiff used as evidence, the depositions of Adolph Samuel and Philip Rosenthal, taken Nov. 26, 1859, in the city of St. Louis, on a commission issued from the Lee District Court, in this state. In these depositions, they state that their depositions had been taken before in this case, before A. E. Verman, a Notary Public, that they were sworn in the usual form, and that their testimony was then correctly written out by that officer. The witness, Samuel, also states that he bought the goods from Baum for his brother, the plaintiff, under a power of attorney which was attached to the said prior depositions. The depositions thus referred to were suppressed, because of some informality. Plaintiff also used as evidence the power of attorney referred to, which was found attached to the suppressed depositions. The certificate to the depositions first taken, shows that the witnesses were properly sworn, and subscribed the same. After the plaintiff rested his case, defendants offered to read in evidence the suppressed depositions, in order to impeach said witnesses, claiming that they had therein testified to important and material facts which contradict matters stated by them in the depositions used on the trial. The introduction of this

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testimony plaintiff objected to, upon the ground "that defendants had not asked the witnesses on their last examination as to their testimony in the first, and given them a chance to confirm, or explain, the same,—that the words contained in the first deposition should have been called to their attention." The objection was sustained, and defendants excepted.

The question here presented is not free from difficulty. The authorities are not uniform, and the reasoning is not without weight which is brought to bear on either side of the controversy. In our own state, the precise question is an open one, and we are now called upon to settle it. The English rule, and the one adopted in most of the states, as applied to verbal statements out of court, is, that the attention of the witness shall first be called to the time, place and person, involved in the supposed contradiction. In the Queen's case, the subject was fully discussed, and the rule thus recognized. "The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice to which we are not aware of any exception, is this: if it be intended to bring the credit of a witness into question by proof of anything that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved." And again, "If evidence of this sort could be adduced on the sudden, and by surprise, without any previous intimation to the witness or to the party producing, great injustice might be done; and, in our opinion, not unfrequently would be done, both to the witness and to the party; and one of the great objects of the course of proceeding established in our courts, is the prevention of surprise, as far as practicable, upon any person who may appear therein." (2 Brod. & Bing., 318.) And says Mr. Greenleaf (1 Ev., § 462), "This course of proceeding is

considered indispensable, from a sense of justice to the witness; for, as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning and design of what he is proved elsewhere to have said." As applied to verbal statements, this rule has been recognized in this state. (*Glenn v. Carson*, 3 G. Greene, 529; *State v. Ruhl*, 8 Iowa, 447.) And we cannot see why the reason of the rule does not apply with equal weight in the case of depositions.

Counsel claim that the rule, if extended to letters, written agreements and affidavits, should not be to depositions, and that in this way the authorities can be reconciled. To our minds, however there are as strong, if not stronger, reasons for extending it to depositions, as to *ex parte* affidavits and instruments of that nature. A letter or affidavit usually refers to some one distinct matter. A deposition is often voluminous, containing answers to a great number of interrogatories propounded in the various forms suggested by the ingenuity of counsel. It is sworn to it is true, but the witness is not apt to have that personal interest in its contents, nor to remember all that he said, nor its object and purpose, as in the case of an affidavit made for some specific purpose. Months or years afterwards he may be examined in the same case. He is asked if at such a time his deposition was taken, and the instrument is fully identified. There is no intimation, however, that this identification is for the purpose of introducing his former testimony to impeach him. His attention is not called to anything he then stated. No opportunity is given him to explain, for he is not advised that explanation may possibly be necessary.

Now, in what does such a case differ, in principle, from that of a witness who has been previously examined upon the stand? And would it be claimed that a party could, by asking him if he did not, on a day and before a court named, testify in the same cause, and if his testimony at that time was true, thus lay the foundation, without more, to impeach him? It seems to us most clearly not. Common justice would certainly dictate that he should be first asked, whether or no he swore to that which is intended to be proved.

It is suggested that the deposition is a writing, carefully written out, read over to the witness and by him subscribed, and that in these respects it differs from testimony upon the stand. These differences are admitted, and yet we do not see how they can affect the reason of the rule. Why should the witness not have an opportunity, in the one case as well as the other, to correct the statements already given, as well as by a re-examination, to explain the nature, circumstances, meaning and design of what he had previously sworn to? We can see no good reason for the application of a different rule in the two cases. Nor can we see why the introduction of such impeaching testimony would not work a surprise upon parties, and thus produce injustice in the case of depositions, as well as in that of verbal statements.

Nor is this view, as before suggested, without authorities to sustain it. In the case of *Stephens v. The People*, (19 New York,) counsel for the prisoner offered the depositions of certain witnesses, taken before the coroner, for the purpose of impeaching their testimony on the trial. It was held that such parts of the depositions as had been called to the attention of witnesses, during their examination, might be read, but that the rest should be rejected. STRONG, J., remarking that "if it was designed to discredit the witnesses by showing that their evidence before the coroner

Samuels v. Griffith.

differed from that given by them on the trial, they should have been previously furnished with an opportunity for explanation" (p. 570). And to the same effect are the cases of *Conrad v. Griffey*, 16 How., 45; *Howell v. Reynolds*, 12 Ala., 131; *Morrison v. Myers*, 11 Iowa, 538.

But it is urged that in this case there was a sufficient compliance with the rule, that the attention of the witness was called to his previous testimony. To some extent we have already answered this position. It would certainly be assuming too much to say that the witness was notified that he was to be impeached, or that he was furnished an opportunity for explanation. As well might it be claimed that he was furnished with an opportunity in the case of verbal statements, if he was asked if he did not at a particular time and place, have a conversation with a particular person on the subject matter of the suit. Such a course of inquiry is not a compliance with the spirit of the rule. *Pendleton v. Empire Company*, 19 N. Y., 13. Nor is the course adopted in this instance any more so.

The presence of the first deposition, at the time of taking the second, was not necessary to enable the party to lay the required foundation. The interrogatories accompanying the second commission might have been framed so as to meet the case of a possible or expected conflict. Or, if not this, a new commission could have been issued, at the instance of defendants, for the purpose of laying the proper foundation.

The judgment is

Affirmed.

Wilson v. Holcomb.

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80 000

WILSON v. HOLCOMB.

1. CONVEYANCE: NOTICE. Third persons are bound by notice of a conveyance to the same extent they would be by the recording of a deed in all respects regular and perfect.
2. PLEADINGS: EVIDENCE. A sworn answer in chancery, when not demanded under oath, puts in issue only the allegations of the bill; following *Sheppard v. Ford*, 10 Iowa, 502.

Appeal from Dubuque District Court.

FRIDAY, APRIL 11.

FOR a statement of the facts, see the opinion of the court.

Burt, Angell & Lyon for the appellant, relied upon *Brace v. Reid*, 3 G. Greene, 422; *Le Neve v. Le Neve*, 2 Eq. L. C., pt. 1, 98; *Jackson v. Given et al.*, 8 John., 140; *Jackson v. Van Valkenburg*, 8 Cqw., 260; *Bumpus v. Platner*, 1 John. Ch., 219; *Griffith v. Griffith*, 9 Paige, 315, 318; *Wheaton v. Dyer*, 15 Conn., 309.

Wilson, Utley & Doud for the appellants, relied upon *Williamson v. Brown*, 15 N. Y., 354; *Nailor v. Fisk*, 5 Cush., 256; *Aiken v. Sneed*, 1 Tenn. R., 304; *Dunham v. Day*, 15 John., 567; *Rogers v. Jones*, 8 N. H., 268.

BALDWIN, C. J. — Wilson, the complainant, for a valuable consideration, purchased of and received a deed from one Cumber, for about twenty acres of land situated within the county of Dubuque. This deed bears date January 19th, 1858, but by inadvertence was not filed for record for one year after its delivery. The twenty acres thus sold were but a portion of a large tract of land owned by said Cumber. Before the deed to complainant was filed for record, Cumber sold certain lands adjacent to that sold to complainant to one Patterson, and by mistake, as it is alleged, included in the deed to Patterson the land sold to complainant. Patterson subsequently sold all of the lands

conveyed to him by Cumber, to respondent Holcomb. It is alleged in the bill that Patterson bought the lands of Cumber, with a full knowledge of the rights and equities of the complainant. It is also charged in the bill that the respondent, when he purchased of Patterson, was fully advised of the deed from Cumber to complainant, and that he bought the same with the understanding that the land was included in the deed from Cumber to complainant by mistake, and that respondent was not a purchaser of said premises in good faith, and for a valuable consideration, without any notice of complainant's title.

Patterson admits in his testimony, that he was fully advised of the complainant's title, and we think the testimony conclusively shows that the respondent was at the date of his purchase also advised of the deed from Cumber to complainant.

The effect of notice to a purchaser of an outstanding title, has been so thoroughly canvassed, that there can be no doubt at this time as to the correct rule of law on the subject. In the case of *Dunsmore v. Bennett*, 5 Iowa, 95, the court in their opinion say, "As to ordinary conveyances, if third persons have actual notice of them, they are bound by such notice to the same extent as they would have been by the recording of a deed in all respects regular and perfect in its acknowledgments." So in the case of *Williamson v. Brown*, 15 N. Y. R., 354, "It is said that a purchaser who has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, and has neither inquired nor ascertained the extent of such title, has been guilty of a degree of negligence that is fatal to his claim to be considered a *bona fide* purchaser."

So when a purchaser of land has notice of an outstanding equity, he cannot acquire a title discharged of that equity. *Nailor v. Fisk*, 5 Cush., 256. Assuming, then, the rule to

be that where such purchaser has actual notice of the title of a third party, he is affected the same as though such title had been duly recorded, the remaining question to be determined is, whether from the evidence, the court correctly found that the respondent in this case had such notice of the complainant's equities.

The point relied upon by the counsel for appellant, is, that Patterson had no notice of the complainant's title until after he had received the deed and paid the purchase money, and that, if this be true, it matters not whether the respondent had actual notice or otherwise, if his vendor *had no actual* notice when he purchased. We conclude from the evidence that the contract was not fully consummated between the complainant and Patterson before actual notice, or such notice as should lead to inquiry, was given to the purchaser. Patterson objected to the deed as not containing the quantity of land purchased, and when this objection was made, he was told that a portion of the land had been sold to Wilson. After this he made no further objections, and placed his deed on record, and afterwards recognized the complainant's right to said land.

The answer of respondent denies all the allegations of the bill under oath, and avers specially that he had no notice of the complainant's title from Cumber. The respondent's counsel, in their argument, mistake the effect of a sworn answer in a chancery proceeding, when they say that it is to be considered as of equal weight as that of two disinterested witnesses. The answer in this case, was not required by the complainant to be under oath, and under the ruling of this court, in the case of *Shepherd v. Ford*, 10 Iowa, 502, it only put in issue the allegations of complainant's bill.

The evidence supports the bill, and the decree of the District Court is

Affirmed.

 Casady v. Woodbury County.

CASADY V. WOODBURY COUNTY.

1. **COUNTY BONDS: POWER OF COUNTY JUDGE.** A county judge had no power to issue the bonds of the county running a series of years and drawing interest at the rate of ten per cent per annum, in the absence of any authority conferred by a vote of the people of the county, in the manner prescribed by law.
2. **CONTRACT: CONSIDERATION.** A contract supported by a promise to do two things, one of which is legal and the other illegal, may be enforced as to that which is legal, unless the two are so bound together and mingled that they cannot be separated, in which case the whole promise will be treated as void.
3. **EQUITY: REFORM OF CONTRACTS: MISTAKES OF FACT.** A court of equity may reform mistakes of fact in contracts, whether they prejudice one party or the other; but this power does not extend to the making of a new contract for the parties by correcting mistakes of law.
4. **DECREE UNDER A GENERAL PRAYER.** A court of equity can not, under a general prayer, grant relief for which no proper basis has been laid in the allegations of the petition.

13	118
99	587
13	118
104	663
13	118
123	11

Appeal from Polk District Court.

FRIDAY, APRIL 11.

SPECIFIC PERFORMANCE. The facts are stated in the opinion of the court.

Casady & Polk for the appellant, contended:

1. That the county judge had power, without consulting the people of the county, to purchase a court house and other public buildings. *The State of Iowa, ex rel. Brooks, v. Napier, County Judge*, 7 Iowa, 429.
2. That he had the power to buy on credit, and execute a note, bond or bill, evidencing such promise to pay. *Hamilton v. New Castle Railroad Company*, 9 Ind., 359; *Smead et al. v. The Indianapolis, Pittsburgh and Cleveland Railroad Company*, 11 Id., 104; *Clapp v. The County of Cedar*, 5 Iowa, 49; *Ring v. The County of Johnson*, 6 Id., 270.
3. When a suit is brought for a specific performance of a contract, and

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through a change of circumstances, mistake, or misapprehension, either party becomes unable to perform the same in accordance with the strict letter of the contract, or it appears to the court unconscionable to so enforce it, the chancellor will so modify the agreement as to do justice between the parties. *Bank of Alexandria v. Lyner*, 1 Pet., 376; *Taylor v. Longworth*, 14 Pet., 173; *Winnie v. Reynolds*, 6 Paige's R., 497; 2 Story Eq. Jur., § 775; *Pratt v. Law*, 9 Cranch, 492; *Woodcock v. Bennett*, Cow. R., 711; *Andrews v. Brown*, 3 Cush., 130. 4. If one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, which are not so mingled and bound together that they cannot be separated, that which is good will be enforced, while that which is void will be disregarded. 1 Pars. Cont., 380, and cases cited in the note; *Chitty on Cont.*, 597, and cases cited in the note; 1 Smith's L. C., 364, and notes to case of *Collins v. Blantern*; *Kenison v. Cole*, 8 East., 236; *Doe v. Pitcher*, 6 Taunt., 339; *Greenwood v. The Bishop of London*, 5 Id., 727; *Newman v. Newman*, 4 Mees. & S., 66; *Leavitt v. Palmer*, 3 Conn., 37.

Thos. F. Withrow, for the appellee.

The appellant asks the court to modify the contract which it refuses to specifically enforce, and by its decree to order the county judge "to issue warrants of the county, or promissory notes" for the sum of twenty-five thousand dollars. This is based upon the assumption that the parties entered into the contract in good faith, "under the mistake or misapprehension of the power of the county judge to issue bonds." To this we interpose these objections:

I. The court cannot, under the general prayer for relief, make a decree for which no proper basis has been laid in the allegations of the bill. The stating part of this bill does not contemplate such relief. It was framed solely with a view to a specific performance of the contract. 1

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Barb. Ch. Pr., 37; *Wright v. Dane*, 2 Pick., 59; *Colter v. Ross*, 2 Paige Ch. R., 397; *English v. Foxall*, 2 Pet., 595; Mit. Ch. Pl., 40, and notes.

II. Conceding that the allegations of the bill are sufficient to authorize such a decree under the prayer for general relief, the court has no power to grant it. The case presented, upon appellant's own showing, is this: The plaintiff and the county judge of Woodbury county entered into a written agreement, wherein the former agreed to convey to the county certain property for court-house purposes, in consideration for which the county judge agreed to pay to the plaintiff the sum of five thousand dollars in warrants when the conveyance was executed; seven thousand dollars in bonds (with coupons attached) due in five years, and bearing interest at the rate of ten per cent per annum; and thirteen thousand dollars in bonds of the same description when the incumbrances should be removed. The court holds that the contract on the part of the county, being unauthorized by a vote of the people, was void and will not be enforced. The appellant then says it was made "under a mistake or misapprehension" of the law, and asks the court to "modify" a void contract, or to make a new contract for the county and order its specific performance. A specific performance is refused, not because the contract is unconscionable, or because the county could not perform, but for the reason that it was entered into by a fiscal agent without the scope of his authority. *Hunt v. Rousmaniere*, 1 Pet., 1; *Adams Eq.* (4th Am. ed.), 386; *Ld. Irnham v. Childs*, 1 Bro. Ch. R., 92; *Woolam v. Hearn*, and notes, 2 Equity, L. C., part 1, p. 537; *Lyon v. Richardson*, 1 John. Ch., 60; *Schmidt v. Labalet*, 1 Speer's Eq., 421; *Dow v. Kerr*, Id., 113; *Greenwood v. Eldridge's Administrators*, 9 Conn., 96; *Hunt v. Rousmaniere*, 8 Wheat., 404; *Warberton v. Lauman*, 2 G. Greene, 426.

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III. Neither can the court render a decree "for compensation and damages." Such a decree would not be sustained by a single allegation in the bill. Nowhere is the value of the property alleged; nowhere is the amount or character of the damages sustained alleged or proved, or attempted to be alleged or proved. The plaintiff must abide by the case he has made by his petition. He will not be allowed to make a different one by his proof and on the hearing. *Singleton v. Scott et al.*, 11 Iowa, 594.

LOWE, J. — In October, 1859, the plaintiff filed his petition to obtain a specific performance from the county of Woodbury, of a contract entered into on the 29th day of April, of the same year, between himself and JOHN L. CAMPBELL, the then County Judge of said county. It is claimed by plaintiff that he sold to defendant, at the date of said contract, for a court-house and county offices, his large two-story brick building, with the ground upon which it was situated, to wit: 100 feet taken off of the east end of lots 1, 2 and 3, in block 34, in Sioux city, for the sum of \$25,000, \$5,000 of which was to be paid in ordinary county warrants, the balance in county bonds, running five years, with coupons attached, securing the payment of ten per cent interest annually. These evidences of indebtedness were to have been issued and delivered at once, and although the plaintiff had performed his part of the contract in all respects, and had conveyed the property in question by deed to the defendant, yet the defendant had failed, and now wholly refuses to make the payments in the manner specified. A written contract, purporting to have been executed by the parties, or a copy thereof, is filed with the petition as an exhibit, *prima facie* sustaining the plaintiff's allegations.

The defense makes a denial that JOHN L. CAMPBELL was a county judge of Woodbury county, at the time said contract was in fact executed and finally consummated;

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alleges that if he was, it was nevertheless without his authority to make such a contract; that the price agreed to be given was grossly in excess of the real value of the property, and a fraud upon the county.

On trial below, the court denied the relief asked, from which the plaintiff appeals.

The competency of a county judge to bind a county in a large indebtedness by negotiable securities, running a series of years, paying an annual interest of ten per cent secured by coupons, in the absence of any authority from the people of the county, to be expressed in the mode prescribed by law, has been settled by this court in the case of *Hull & Argalls v. The County of Marshall*, 12 Iowa, 142, against the exercise of any such power. A majority of this court being still well satisfied that the exposition given in that case of the powers and duties of a county judge touching this subject, is the true and correct one, it follows that a performance of the terms of the special contract set up in the petition in this case as asked for, cannot and ought not to be decreed.

The plaintiff, however, has a prayer for other and general relief in his petition, under which he claims he has a right to relief, and insists that inasmuch as it is conceded that the county judge has the power to contract for the building or purchase of a court-house, and may lawfully issue county warrants in payment thereof, therefore a portion of this contract is valid, and may, to that extent, be enforced under the principle of law laid down in 1 Parsons on Contracts, 380, and 1 Smith's Leading Cases, 364, and other authorities cited, to the effect "*that if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated, in which case the whole promise is void; and this is so whether the law which is violated be statute*"

or common law." The recognition of this principle is freely accorded, but unfortunately for the plaintiff, the good and the void parts of this contract are so blended, that we cannot, in the present aspect of this case, give effect to the one by excluding the other, without doing manifest injustice to the defendant. For instance, under this contract, as set up in the petition, it is covenanted that the defendant, for the consideration specified, should issue and deliver at once the \$5,000 of county warrants, and \$7,000 of the bonds, and also issue the remainder, to wit, \$13,000, so that they should be drawing interest, but not to deliver this last named amount of bonds until plaintiff had paid off or otherwise removed a larger amount of incumbrances resting upon the premises sold. Now, if this contract had been valid in law, and honestly entered into between the parties, we suppose a court of equity would compel the defendant to issue and deliver to the plaintiff the two first amounts of paper specified, notwithstanding the incumbrances, for the reason that the defendant had stipulated that the withholding of bonds to the amount of \$13,000 would be a sufficient indemnity to the county against loss from that quarter. But if we apply the principle of law above suggested by plaintiff's counsel, rejecting the bonds as the void part of the contract, and decree a performance of the same so far as the issuance and delivery of the warrants are concerned, what becomes of the county's security against loss from incumbrances, for the pleadings and the evidence both show that these incumbrances are still resting upon the property?

But it is due to the plaintiff to say that notwithstanding he pressed the above proposition of law, as applicable in some sense to this case, yet he would not be willing to accept the \$5,000 of warrants for his property, but holds the doctrine that it is competent for the chancellor, if the parties through mistake or misapprehension have entered

Cassady v. Woodbury County.

into a contract that was illegal in form, or perhaps in substance, to reform the same, and then compel its performance in its reformed state. All mistakes of fact in contracts are the subject of equitable reform, whether they prejudice one party or the other; not so in regard to mistakes of law. The one under consideration belongs to the latter class of mistakes. It could not be reformed in the method suggested without involving an important change in the terms of the contract. To give to the plaintiff \$25,000 in county warrants, payable *in presenti*, drawing after presentation only six per cent interest under the law, might be a very different payment in value from the one specified in this contract, \$20,000 of which was to be in bonds, in the form of negotiable securities payable *in futuro*, and drawing ten per cent interest. Now, if the court should undertake to reform this contract by rejecting the bonds and substituting therefor county warrants, it would have to determine the difference in the market value of these two classes of paper, for the purpose of determining whether the defendants in this case should pay more or less than \$25,000; not only so, but would have to determine, in the altered terms of the contract, what amount of warrants would have to be withheld to secure the defendant against loss from incumbrances. All this simply involves the making of a new contract by the court for the parties, a kindness which equity seldom if ever indulges in. It is true, like charity, equity is beneficent and imagines no evil, and will protect and enforce the rights of parties, correcting mistakes of facts where they supervene and stand in the way of justice, but will not carry its friendly offices to the extent of making contracts for parties, nor furnish them with illumination of mind sufficient to make lawful contracts for themselves.

But if it was competent for the court to correct or reform a contract made under a mistake of law or fact, still in this case, as was very properly urged by counsel for the

defense, it could not be done, for the reason that such a decree would be unauthorized by any fact stated in the body of the petition. The whole bill is framed upon the idea that the special contract therein set forth is legal and binding upon the parties, and should be specifically performed. There is no suggestion or allegation that the parties had innocently mistaken the law in fixing the terms of the contract, or statement of other equitable circumstances, to the effect that the defendant had, subsequent to the making of the contract, acted under it, taking possession of the property said to be purchased, and deriving more or less benefit from its use, &c., so as to furnish some ground for a call upon the court to protect and enforce the rights of the plaintiff through the medium of a reformed contract. It is a misconception to suppose that the court can, under the cover of a general prayer for relief, make a decree or grant relief which has no proper basis in the facts set up in the petition. 1 Barb. Ch. Pr., 337; 2 Pick., 59; 2 Paige Ch. R., 397; 2 Pet., 596.

This view of the questions arising upon the contract and pleadings disposes of this case, making it unnecessary for us to express any absolute opinion upon some other questions of fact which lie back of these, and upon which several hundred pages of depositions were taken, and which were mooted with ability by counsel representing the parties. A very few general remarks must suffice this part of the case. The question touching the resignation of Judge CAMPBELL, on the 29th of April, 1859, with whom the plaintiff alleges he made the contract on that day, and which is made to figure extensively in the testimony of witnesses and the discussions of the parties, was foreclosed and placed beyond the pale of controversy, by a proceeding in *quo warranto* instituted upon the relation of Judge CAMPBELL himself against his successor in office, and which resulted in a decision, by a court of law, before this suit

was commenced, holding in effect that the said CAMPBELL had in verity resigned his office of County Judge on the 29th of April, 1859, and that his successor Joseph M. Field was not a usurper, &c., &c.

In regard to the point whether the contract in question was formally consummated before or after Judge CAMPBELL had resigned, the evidence is entirely too conflicting to be reconciled, and calls for the laying down of some rules, on the subject of credibility of witnesses under our new procedure, allowing the parties themselves to testify, of quite too much importance to be placed in the category of mere *obiter dicta*.

If this contract was made at all, it was made on the day that Judge CAMPBELL resigned his office as County Judge. There is nothing in the evidence showing that any of the county authorities ever recognized this contract after that date, or that the county ever received the slightest benefit under the same. The deed alleged to have been made to the county of the property said to have been sold, is not of record, nor can the same be found upon file in the County Judge's office. We do not see therefore but that the parties are shut up to the necessity of remaining *in statu quo*. It may be, that notwithstanding the illegality of the contract entered into in this case, if the defendant had subsequently recognized the same, taken possession of the property, and used it as its own, that the law upon the application of the plaintiff would compel the defendant to pay what the property was fairly worth. But this is not the case. Still it is true, that the plaintiff, supposing he had made a sale of his property to the county, did incur expense in finishing off his house in a style and in a manner that he otherwise would not have done, and thereby may suffer loss. We know of no remedy for this, either in law or equity. Nevertheless, we see in this circumstance, a reason why the county may negotiate anew for the pur-

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chase of said property on terms that shall be lawful and fair to all parties, especially as the evidence shows that the building is very well adapted for county purposes. Judgment below

Affirmed.

 BEVAN V. HAYDEN, Sheriff, &c.

1. **EXEMPTION: EVIDENCE.** The sufficiency of the evidence to show that a team was "habitually used" by the owner to earn a livelihood, and was exempt from execution, considered.
2. **SAME: CONSTRUCTION.** The exemption laws should be liberally construed.
3. **SAME: TEAM.** A team which has been procured in good faith for the "habitual use" of the owner in earning a livelihood, is exempt from levy and sale under execution.
4. **WITNESS: COMPETENCY.** The plaintiff in an action of replevin against a sheriff to recover the possession of property taken in attachment, is not, under § 3982 of the Revision of 1860, rendered incompetent as a witness by the death of the attachment plaintiff.
5. **REPLEVIN: PARTIES.** In an action of replevin to recover property taken by a sheriff under a writ of attachment, the executor of the plaintiff in the attachment suit is not a proper party.
6. **SAME: EVIDENCE.** In an action of replevin a bill of sale of personal property, executed by a third person and ratified by the plaintiff, is not admissible for the purpose of showing that plaintiff is not entitled to the possession, unless connected with evidence showing that the possession was transferred under such sale.
7. **PRACTICE: NEW QUESTIONS IN APPELLATE COURT.** The Supreme Court will not consider questions not raised and passed upon in the court below.
8. **IMPERFECT INSTRUCTIONS.** It is not error to refuse an instruction when asked in terms requiring modification.
9. **SALE OF EXEMPT PROPERTY.** A person owning property exempt from execution, may dispose of the same by sale, and an attachment levied while a sale is being made and before it is perfected, does not affect the right of the owner under the exemption laws.

18	122
83	342
13	122
88	250
13	122
117	390

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Appeal from Dubuque District Court.

FRIDAY, APRIL 11.

THE facts are stated in the opinion of the court.

Wilse & Sawyer for the appellee, contended,

1. That plaintiff did not belong to one of the classes of persons entitled to an exemption of a wagon, under § 3304 of the Revision of 1860. 2. That as the defendant had two wagons, the one for which he had a team was exempt, if either. 3. That by consenting to the attachment of the wagon in controversy, he waived his right of exemption.

Burt & Angell for the appellee.

LOWE, J. — Replevin to recover the possession of a two-horse wagon, which had been seized under an attachment at the suit of one McDonald, by defendant, then sheriff of said county; but which the plaintiff claimed fell within the class or description of property which, under the Statute, was exempt from levy. On a trial thereof the plaintiff's claim was sustained, and the court, after overruling a motion for a new trial, rendered in his behalf a judgment for the property.

The bill of exceptions certifies all the evidence adduced on the trial, the instructions given and refused, as well as the grounds upon which the new trial was asked and overruled, disclosing the points excepted to at the time, and which are now urged as matters of error.

The first assigned error claiming our attention will be the question, whether the verdict of the jury was so manifestly against the weight of evidence as to have made it the duty of the court below to grant a new trial. The evidence is brief, and may be stated in substance, as follows:

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"The plaintiff was the head of a family, and up to July or August, 1858, was a plumber by trade, at which time he ceased to follow that business for a livelihood. In the spring of that year he had taken said wagon in payment of a debt. In the forepart of September, 1858, he sold his house in Dubuque, taking in exchange therefor land in Fayette county, to which he afterwards removed for the purpose of farming. During a portion of the months of August and September, of the same year, he hauled with said wagon some lumber and stoves for himself, and a quantity of wood for a Mr. Green, receiving in pay therefor some five cords of wood. After this, on the 18th day of September, 1858, the wagon was attached, being found in the possession and on the premises of the plaintiff, who was present at the time and made no objection, but said that the wagon belonged to another man. At this same time the plaintiff also had a one-horse wagon, which he sold during the ensuing winter, and owned but one horse, borrowing or hiring from a Mr. Green a horse when he used a double wagon. This Mr. Green testified that the plaintiff did use the wagon in controversy as a teamster, to obtain a livelihood for himself, but that he had bought the wagon of him the day before it was attached; yet he failed to state that there had been any delivery; nor did he state any other fact from which it could be inferred that the title had passed from the plaintiff to him, so as to affect the right of creditors."

The foregoing is the sum of all the testimony introduced. It is quite apparent that it leaves the question of exemption in much doubt. If the verdict of the jury had been the other way, its disturbance on the ground that it was not fairly supported by the evidence, would have been very questionable, if not quite unjustifiable. We are inclined to the same opinion in its present form. The question is not as to mere preponderance of evidence, but whether the

verdict of the jury was so manifestly and clearly against the weight of evidence as to authorize us to overrule the exercise of discretion by the court below, the motion for a new trial being determined against the defendant.

In giving the exemption law a liberal construction, which we are required to do, we suppose the intent of the legislature is reached and reflected, when we hold that if a person abandons one employment and procures a team or a part of a team, intending to complete it for the purpose of using the same in good faith to earn for himself a livelihood, that that is such an habitual use of the team in contemplation of the statute, as to exempt the same from levy, whether the party claiming the benefit of the exemption law has had an opportunity of using the property much or little. He must make a beginning; and if his new character as a teamster is shown, the property which he honestly intends to use in that capacity to earn for himself a living, should be as effectually shielded from levy and sale, during that period, as if he had used it for a whole year.

Now the jury may have concluded, from the evidence showing that the plaintiff gave up his business as plumber, and exchanged his property in the city of Dubuque for farming land in the country, on which he intended to live and to which he did subsequently move, that the wagon was essential to use in his new occupation of farming; and that it was his privilege to choose between the one and the two horse wagons, which he should hold and employ for that purpose. The former had only been used in his trade as plumber, and was subsequently sold. It is true that there are other facts and circumstances already detailed in the evidence, from which a different conclusion might be reached. But they are not of that clearly preponderating and controlling character that would justify us in saying that the court erred in not pronouncing the conclusion to which

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the jury had arrived, under the evidence, unauthorized, and therefore should have set it aside.

A question in relation to the competency of the plaintiff to testify is made under § 3982 of the Revision of 1860. The objection is based upon the idea, not proved, but suggested by the counsel, that McDonald, the plaintiff in the attachment, had deceased, and that the facts of which the witness was about to depose had transpired before his, the said McDonald's, death.

If, in the absence of proper proof of the facts which, if true, would exclude the testimony, this objection can be made; still we hold that it is not well taken. The defendant is not an executor, in fact, nor does he represent the interest of, or stand in the place of, an executor in law. It is not his duty, nor has he the right to seize property exempt from process, or which does not belong to either of the parties to the process. If he does he is a *tort feasor*, and can alone be held responsible for the trespass.

Nor did the court below, under the circumstances, err in refusing, upon application, to make the executrix of McDonald a party defendant to the proceeding. Nor, again, did the court err in refusing the defendant's evidence which he offered to introduce, to the effect that the plaintiff's wife, Mrs. Bevan, had, the day before the attachment was levied upon the wagon, executed a bill of sale for the same to one Green. Proof of such a bill of sale although subsequently ratified by the plaintiff, would not, for the purposes of this suit, be adequate to show title in a third person without additional testimony of a change of possession, which was not made, nor offered to be made. The matter of fact is, the evidence shows that no delivery of possession ever *did* take place under that bill of sale, nor is it pretended or shown that Green made any claim thereto. Under such circumstances it is difficult to perceive how the defendant received any detriment from the rejection of the testimony.

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Quite a number of errors assigned, are based upon questions not raised in the court below, or excepted to, and cannot, therefore, be regarded by us. The bill of exceptions shows that the first, second, and third instructions asked by the defense were refused, and also one given by the court, to which exceptions were taken, and these will be briefly noticed.

Neither the language nor meaning of the first instruction refused is sustained by the testimony, and should not have been given, except with proper qualification. We have already held that it was not error to refuse an instruction when asked in terms requiring modification. 10 Iowa, 347.

The second instruction refused was founded upon the rejected evidence in relation to the bill of sale which we have already considered.

The third instruction was so clearly inadmissible that we do not deem it necessary to state the same, or to offer any comments upon it. Counsel for the defense do not in their argument seem to insist upon it.

The following is the instruction given by the court which is claimed to be erroneous :

"That if Bevan consented to the attachment, because he supposed the sale to Green valid, and it turned out that it was not valid as against attaching creditors, because the bill of sale was not recorded, yet he would not be precluded from bringing replevin for the wagon."

The officer attaching the wagon testified that in doing so, the plaintiff did not object; made no claim of exemption, and consented, as he understood him, but at the same time claimed that he had parted with the wagon by sale. The evidence explains the reason why he consented, or did not object. It was because he had sold the wagon, as he supposed, to another person. It so happened, however, that before the sale was entirely completed, that is, before a delivery or change of possession had taken place, the wagon

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was attached by a creditor. This turning out to be the case, the plaintiff afterwards re-asserted his right to the property, claiming it to be exempt from levy. Now, the principle intended to be asserted by the foregoing instruction, although not very aptly or fully expressed, is this, that a person owning property exempt from attachment has a right to dispose of the same by sale; if he attempts to do so and the property is attached before the sale becomes effectual in law, he will not lose his rights under the exemption law thereby, but may insist upon the same. The soundness of such a rule, supposing the parties to act in good faith, will not be gainsayed.

Although the regularity of the proceeding in this case has been assailed in many particulars, still we see no sufficient reason why the judgment below should not be

Affirmed.

COCHRAN V. MILLER.

1. **EVIDENCE: LEADING QUESTION.** A question propounded to a witness in a form which would suggest an answer unfavorable to the party propounding it should not be regarded as leading.
2. **SAME: OPINION.** In an action for damages for mal-practice in the medical treatment of plaintiff by defendant, the father of the plaintiff who had the means of knowing the treatment she had received, was asked, "whether or not he would most likely have known of the application of any other medicines than those applied by the defendant, if they had been applied to the arm?" *Held*, That the question was not objectionable as asking for an opinion.
3. **MAL-PRACTICE: DAMAGES.** In an action for damages against a physician for non-fulfillment of contract in the treatment of a disease which he had undertaken to treat; and for gross negligence in treating the same, the plaintiff may recover vindictive as well as actual damages.

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Appeal from Greene District Court.

FRIDAY, APRIL 11.

MAL-PRACTICE. Verdict for plaintiff, and defendant appeals.

James M. Ellwood for the appellant.

As to the questions raised on the ruling of the court below in refusing to suppress portions of the deposition of C. H. Rawson, cited 1 Stark. Ev., 124; 2 Cow. & Hill's Notes, Phil. Ev. (2d ed.), note 322, p. 722; *McCarver v. Nealy*, 1 G. Greene, 360; *Hendricks & Cooper v. Wallis*, 7 Iowa, 224; *The State of Iowa v. Nash and Redont*, 7 Id., 347. As to the ruling of the court upon the objection to the interrogatory propounded to the witness Cochran, *Gibson v. Williams*, 4 Wend., 320; *Jefferson Insurance Co. v. Cotheal*, 7 Id., 72; *Norman v. Wells*, 17 Id., 136; *Paige v. Hazard & Kelly*, 5 Hill, 608; *Lamoure v. Caryl*, 4 Denio, 370; *Morehouse v. Matthews*, 2 Conn., 514; *Merritt v. Seaman et al.*, 2 Seld. R., 168; *Harger v. Edmonds*, 4 Barb. S. C. R., 256; *Giles v. O'Toole*, 4 Id., 261; *Doolittle v. Eddy*, 7 Id., 74; *Whitmore et al. v. Bowman*, 4 Greene, 148. As to the charge to the jury, Sedg. Dam., 36 (2d ed.), and 204; 1 Kent Com., 618, note. (8th ed.)

Phillips & Phillips for the appellee.

The court ruled correctly upon the interrogatories to, and answers of, the witness Rawson. *Thompson v. Blanchard*, 2 Iowa, 44. The objections now urged were not presented to the District Court and will not be considered here. *Berry v. Gravit*, 11 Iowa, 135; *Mumma v. McKee*, 10 Id., 107; *Keeny v. Chilis*, 4 G. Greene, 416; *Adams v. Foley et al.*, 4 Iowa, 44; *Jones v. Smith*, 6 Id., 230; *Stutzman v. School District No. 2*, 1 Id., 95. The appellant was not prejudiced by the ruling of the court if it was erroneous. *The State of*
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Iowa v. Groome, 10 Iowa, 308; *Campbell v. Chamberlin et al.*, Id., 337; *Pelamourges v. Clark et al.*, 9 Id., 1; *Smith & Co. v. Clark et al.*, Id., 376.

WRIGHT, J.—It is first objected that the court erred in overruling the appellant's objection to certain interrogatories to the witness Rawson, and the answers thereto. Rawson was a physician. Plaintiff claims that defendant was guilty of negligence and malpractice in prescribing for and treating her arm. Rawson, the witness, did not see the arm for some time after this treatment. It was material, on the trial, to account for the scar found on the limb and the contraction of some of the muscles. It seems, that at the time of the treatment the plaintiff was thought to have erysipelas. The witness was asked, "Whether or not the scar and contraction on the arm could or would not be the legitimate result of erysipelas." This was objected to as leading and irrelevant. Several other questions of the same character were objected to upon the same grounds.

The objections were correctly overruled. In view of the issue made, no testimony could certainly be more material or relevant than that sought to be elicited by the inquiry. The question is far from being well propounded, in view of the testimony sought, but the defect strikes the plaintiff and not the defendant. If any answer is suggested by the inquiry, it is one against the party asking the question, and not in his favor. The witness could not fairly nor reasonably conclude that he was expected to state that something else than erysipelas had produced the scar and contraction. The question was not leading.

II. It seems that defendant claimed that other medicines were applied than those prescribed by him. The father of plaintiff was asked: "Whether or not he would most likely have known of the application of any other medicines than those applied by the defendant, if they had been applied to the arm." It is objected that this interrogatory

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called for the *opinion* of the witness on a matter of fact, and was therefore objectionable. The position is not tenable. The plaintiff was living in her father's house. He had abundant means of knowing the treatment she received. His answer to this question would be no more objectionable, upon the ground of containing an *opinion* instead of a *fact*, than if he stated that defendant had prescribed and given medicine for the disease. The inquiry is a very common one, and one that may be fairly and legitimately made under the precise circumstances as here disclosed. Were other medicines applied? Plaintiff says not, and to maintain, so to speak, this negative, she makes this inquiry of one who had ample means of knowing.

III. The following instruction, given at the request of plaintiff, was objected to: "If you further find that the contraction and scar, and deformity of the arm of plaintiff, was occasioned by the improper treatment of plaintiff by defendant, and the application of improper remedies, then you are not restricted to the actual damages plaintiff has sustained, but may give such further damages as, in your judgment, would be proper under the circumstances of the case." Plaintiff seeks to recover of defendant, not alone for the non-fulfillment of his contract, but for his gross negligence in the treatment of the disease which he had undertaken to treat. If there was such negligence and inattention, (all of which the court had previously explained,) then the instruction was certainly not objectionable. The language used is not so definite as it might have been, and perhaps should have been, if defendant had asked it. But it does not assert an improper rule of damages, and this is the extent of the objection to it.

IV. If it affirmatively appeared that all of the testimony was before us, we should very strongly incline to the conclusion that the verdict was not warranted. This is not shown, however, and the judgment must stand

Affirmed.

Amsden v. The Dubuque and Sioux City Railroad Company.

AMSDEN V. THE DUBUQUE AND SIOUX CITY RAILROAD COMPANY.

1. **NEGLIGENCE AS A DEFENCE.** In an action against a Railroad Company for a breach of a contract to leave freight cars on a side track for the purpose of receiving and taking away freight, the defendant, in one count of his answer, alleged that the plaintiff had negligently permitted freight cars to stand upon the said side track so near the main one that one or two collisions had taken place, and there was danger of others, and the plaintiff was unwilling to become responsible for the injuries that might result from such negligence. It was held, that as this defense was not set up as a counter-claim or set-off, and was not stated as a defense in bar, it was properly stricken from the answer.
2. **ERROR WITHOUT PREJUDICE.** A cause will not be reversed because improper evidence was admitted, when the record shows affirmatively that such evidence was not considered by the court.
3. **RAILROAD COMPANY: CONTRACT.** The liability of the Dubuque and Sioux City Railroad Company, on a contract of the Dubuque and Pacific Railroad Company, considered and determined.

Appeal from Dubuque City Court.

MONDAY, APRIL 14.

THE plaintiff seeks to recover of the defendant for a breach of the following contract:

“In consideration that B. M. and N. C. Amsden, of Manchester, Delaware county, Iowa, release the Dubuque and Pacific Railroad Company from all damages, and claim for damages, for borrow land taken by the Dubuque and Pacific Railroad Company, in the construction of their road to Manchester, which said damages are estimated at two hundred and fifty dollars; the Dubuque and Pacific Railroad Company agree with said B. M. and N. C. Amsden, that on or about the time the track of the road shall be laid to the village of Manchester, they will cause a switch to be put in said track at or near the crossing of the line of Wayne street in said village, and two hundred and fifty feet of side

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track to be laid on the north side of the main track, and will allow said B. M. and N. C. Amsden to build upon and use the said side track for warehouse purposes, and also to continue said track, at their own expense, to the crossing of Sama street; and said Company further agree that they will regularly run their cars to any warehouse that may be built on said side track, for the purpose of receiving or discharging any freight that may be shipped to and from said place by car load. Said side track may be built of T rail or strap rail, and the parties building the same are to keep the respective portions in repair. Done in Dubuque, Iowa, the 26th of January, 1859, under the hands of the president and secretary, and corporate seal of said Company, and the hand of said B. M. and N. C. Amsden.

[L. S.]

J. P. FARLEY, *Pres.*

J. M. MCKINLAY, *Sec'y.*

B. M. & N. C. AMSDEN.

It is alleged, in the petition, that on the 21st day of August, 1860, the Dubuque and Pacific Railroad Company sold and conveyed the road with "its franchises, appurtenances and properties to the defendant, the Dubuque and Sioux City Railroad Company * * * and by the terms of said sale and conveyance the defendants received the said road and franchises and properties upon the same terms and conditions, rights and privileges, as they were held before said sale by the Dubuque and Pacific Railroad Company." The questions raised on the trial below are stated in the opinion of the court. Trial by the court without the intervention of a jury, judgment for the defendant, and both parties appeal.

Burt, Angell & Lyon for the plaintiffs, as to the admissibility of the evidence to which plaintiff excepted, cited 1 Greenl. Ev., § 51; 3 Phill. Ev. (ed. 1859), 143; Lube's Eq. Pl., 19; *Field v. Mayor, &c.*, 6 N. Y., 179; *Clark v. Vance*,

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19 Wend., 232; *Worrall v. Parmelee*, 1 N. Y., 519; *Draper v. Ainsworth*, 9 Barb., 619; in support of the ruling of the court in striking out the second count of the answer. *Allen v. Patteson*, 3 Seld., 478; *Wooden v. Strew*, 10 How. P. R., 48; *Mann v. Morehead*, 5 Sand., 557; *Avery v. Ensign*, 13 How. P. R., 85; *Boyce v. Brown*, 7 Barb., 85.

Platt Smith and *J. M. McKinlay* for the defendants.

LOWE, J. — The plaintiffs, in their petition, state that on the 26th day of January, 1859, and at the city of Dubuque, they entered into a written contract with the Dubuque and Pacific Railroad Company, by which they relinquish their claim of \$250 for borrow land in the construction of said road, in consideration of which the company covenanted to construct a switch in connection with their railway track, near the village of Manchester, and to take off with their cars whatever freight plaintiffs should have for transportation at their warehouse, to be built near said side track. The switch and warehouse were severally built, and freight carried off for a given period as per agreement, when a decree of foreclosure was rendered against the Dubuque and Pacific Railroad Company, for some seventeen hundred thousand dollars, to satisfy which, the railway, with all its franchises and appurtenances, was sold to the defendants in this suit. The plaintiffs claim that in making this purchase the defendants assumed to carry out the contract and obligations of the old company, but had failed to do so, and now refused to leave their cars and take off their freight which they had for shipment, as stipulated in the agreement above specified, to their great damage, &c.

The answer first denies any undertaking or engagement on the part of the defendant to carry out and perform the terms and conditions of the contract set up in the plaintiff's petition, as having been made with the Dubuque and Pacific Railroad Company. Secondly, the answer sets up some

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special matters in relation to plaintiffs' carelessness in the treatment and management of the freight cars left to be loaded and unloaded for their benefit on said side track, to the effect, for instance, that the plaintiffs had negligently left the freight cars standing upon the side track so near to the main track that one or two collisions had taken place, and there was danger of others, and that the plaintiffs were unwilling to become responsible for injuries that might thus result from such negligence. Upon motion, this special matter was stricken from the record, and we think properly so. It was not pleaded as a set-off or counterclaim, nor was it stated in such a manner as to constitute a defense in bar to the plaintiffs' action. Yet the defendants excepted, took their appeal, and assign the ruling of the court on said motion as a ground of error.

On the trial of the cause afterward, before the court, without a jury, the defendants were permitted to introduce evidence to prove that part of the defense which had been thus stricken from the files, to which the plaintiffs excepted, and now urges the same as error. We can discover no good reason why this was done, and of course we believe it was irregular; but the record shows affirmatively that no use was made of the evidence by the judge trying the cause, and we conclude, therefore, the plaintiffs received no prejudice thereby. It is distinctly stated by the court, in his judgment, that he decided against the plaintiffs upon the issue made by the defendants' denial of the allegations in their petition.

The only other grounds of complaint by the plaintiffs, are, that the court erred in holding that the defendants were not bound under their purchase of said railroad and its franchises, to carry out the contract which they claim had been entered into, as stated in their petition, with the Dubuque and Pacific Railroad Company. The only evidence offered upon this point is the conveyance from the

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last named company to the defendants, and we have no hesitation in holding that the plaintiffs' claim derives no support from that instrument.¹

Judgment affirmed.

13	136
92	638
13	136
95	189
13	136
121	223

BRANCH OF THE STATE BANK AT IOWA CITY V. MORRIS *et al.*

1. **ATTACHMENT: DAMAGES ON BOND.** Under § 3238 of the Revision of 1860 the defendant, in an attachment suit, may, by way of counter-claim or cross-demand, recover in the principal action for damages sustained by reason of the wrongful suing out of the writ: and when the bond is joint and several, both as to the obligors and obligees, one of the several

¹ The decree, pursuant to which the conveyance was made, contained the following order:

That the complainants, in taking and acquiring the absolute right and title in said property, namely, the Dubuque and Pacific Railroad, its franchises, right of way, depot grounds and buildings, rolling stock, lands granted by Congress to aid in constructing said road, remaining undisposed of, and other property mentioned in said mortgages, shall take the same, to be by them conveyed, in conjunction with the Dubuque and Pacific Railroad Company, to the Dubuque and Sioux City Railroad Company, in accordance with the terms and conditions hereinafter set forth. And the Dubuque and Sioux City Railroad Company shall have and hold the lands which were granted by Congress to the State of Iowa, to aid in building said road and branch, and by the State of Iowa to the Dubuque and Pacific Railroad Company, subject to the same rights and obligations, and upon the same terms and conditions as the same were held by the Dubuque and Pacific Railroad Company.

The *habendum* in the deed is as follows:

Now, therefore, in consideration of the premises, the said trustees, Morris K. Jesup, Platt Smith, William W. Hamilton and Hermann Gelpcke, and the Dubuque and Pacific Railroad Company, hereby remise, release, sell and convey to the Dubuque and Sioux City Railroad Company, the said railroad, its franchises, appurtenances and the other properties aforesaid; also, the said lands granted by Congress, so far as the same remained undisposed of at the time of said foreclosure, to have and to hold the same upon the same terms and conditions, rights and privileges, as they were heretofore held by the Dubuque and Pacific Railroad Company.

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obligees may set up such damages as a counter-claim against one of the several obligors.

2. **SUBSTITUTED BOND.** When a new bond is substituted for the one filed at the commencement of an attachment suit, it takes the place of the original bond, and will be treated as if filed when the action was commenced.

Appeal from Johnson District Court.

TUESDAY, APRIL 15.

THIS action was brought against Morris, Welsh and Dickey, upon two joint and several promissory notes. An attachment was asked and issued against the property of Morris and Welsh, and each of them. The attachment bond was joint and several, and made payable to Morris and Welsh, or either of them. Morris alone answers, and, among other matters, pleads a set-off, for damages sustained on account of the wrongful suing out of the attachment. To this part of the answer there was a demurrer, which was sustained, and defendant (Morris) appeals.

Clark v. Davis, for the appellant, relied upon *Reed v. Chubb Bros., Barrows & Co.*, 9 Iowa, 178; *Zinn & Co. v. Williams*, Id.; *Stadler Bros. & Co. v. Parmelee & Watts*, 10 Iowa, 23; Revision of 1860, §§ 2764, 2836, 2889.

Edmonds v. Rawson for the appellee, cited *Stadler Bros. & Co. v. Parmelee & Watts*, 10 Iowa, 25.

WRIGHT, J. — This action was commenced in January, 1861. The writs of attachment (for there were three) were issued at the commencement of the proceeding. The questions arising, therefore, are to be determined under the Revision of 1860.

In the cases of *Reed v. Chubb and others*, 9 Iowa, 178; *Zinn v. Williams*, Id., 178, and *Stadler Bros. & Co. v. Parmelee & Watts*, 10 Id., 23, it was held by a majority of the judges under the Code of 1851, that if the writ was sued out at

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the commencement of the action, a claim for damages for wrongfully suing it out, might be set off against plaintiff's demand. The language of the Revision, § 3172, is the same as that of the Code of 1851, § 1846. This court, as now organized, would, perhaps, give a different construction to this statute, but this we need not discuss, as we unite in the opinion that § 3238 of the Revision expressly recognizes the right of a defendant to claim such damages in the trial of the principal cause. It is there declared that the defendant's remedy shall be on the bond, but he may, in his discretion, sue thereon, by way of counter-claim or cross-demand, and, in such case, shall recover damages as in an original action on such bond. Aside from the fact that this section seems, in express words, to treat such demand as a counter-claim, we should have been inclined to hold that it did not arise out of the contract or transaction set forth in the petition, and that it was not connected with the subject of the petition, within the meaning of § 2889, which gives the definition of a counter-claim. We should, as before intimated, have entertained heavy doubts, also, whether it was a cause of action, upon which suit might have been brought at the time of the commencement of the main action, as contemplated by § 2891, defining a cross-demand. The section referred to, however, (§ 3238,) gives the rule and definition as applied to this class of cases, and this we are not at liberty to disregard.

It was held in *Stadler Bros. & Co. v. Parmelee & Watts*, 10 Iowa, 23, that if the bond was joint and several, the obligee might set off his damages against a demand in favor of one or all the obligors. But not so when the bond was joint only. In this case the bond is joint and several, and, upon the authority of the above ruling, defendant would have a right to set off his damages against the plaintiff, (the Bank) one of the several obligors. But can Morris, one of the joint

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and several obligees, set up this cause of action against one of the joint and several obligors. We are clearly of the opinion that in view of the power given to the court to render judgments, in such cases, by § 3123, (Rev.) he may set it up as a counter-claim, (and perhaps as a set-off.) Whether he could as a cross-demand, may admit of more doubt. (And see *Eyre v. Cook*, 10 Iowa, 586.)

There is no objection to defendant's demand, that he claims as for a tort, and not upon contract. He claims damages arising under a contract, most clearly. If it was otherwise, it is questionable whether it would make any difference. *Raver v. Webster*, 3 Iowa, 502.

The bond on file was substituted for the one given at the commencement of the action, and as it had the effect of sustaining and upholding plaintiff's attachment from that time (as far as the requirement of a bond is concerned,) so, from that date it is to be treated as defendant's security. Being such, it was not a claim accruing to defendant after the commencement of the action, as assumed by plaintiff. It took the place of the original one, and is to be treated as if then filed.

Other matters of minor importance are discussed by counsel. The foregoing views, however, dispose of the substantial points, and the judgment below will be

Reversed.

THE STATE OF IOWA, *ex rel.* VAN HOUTEN, v. THE COUNTY
JUDGE OF HARDIN COUNTY.

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112	508

1. **MANDAMUS: RE-CANVASS OF VOTES.** The District Court has power to compel the board of canvassers to re-canvass the votes cast at an election to fix the location of a county seat; and the judgment of the court upon the return of the board to a writ of mandamus, is, until it is reversed, binding, and cannot be collaterally impeached.

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2. COUNTY SEAT: RECORD. In determining where the records of a county should be kept, the county judge had no power to go behind the record of the election.

Appeal from Hardin District Court.

TUESDAY, APRIL 15.

FOR a statement of the facts out of which this case arose see the report of the same case on a former appeal, 10 Iowa, 65, and *The State of Iowa, ex rel. Alderson, v. The County Judge of Hardin County*, 11 Iowa, 11. The particular questions raised on this appeal are stated in the opinion of the court.

H. C. Henderson for the appellant.

Does the record set out in the defendant's return constitute a bar to this proceeding? The determination of this question depends upon the following propositions of law:

I. The granting of an alternative writ of mandamus is not such an ascertainment of right, and a judgment of the court upon the right, as to conclude all the parties, and all the world beside. It is not a decision upon the merits, 1 Greenl. Ev., § 530; *The State, ex rel. McCall et al., v. The Justices of Avon*, North C. L. R. (Busbee), 302.

II. If it is a judgment, in order to constitute it a bar it must appear, (1) that it was in an action between the same parties; (2) on the same subject matter; (3) and was a decision upon the merits. 1 Greenl. Ev., §§ 522-530.

III. The proceedings in the case of *The State on the relation of Alderson* are void upon their face, as is clearly shown by their record. A writ of mandamus confers no right and carries with it no authority. *Brown v. O'Brien*, 2 Carter, 423, cited and approved in *The State, ex rel. Rice, v. The County Judge of Marshall*, 7 Iowa, 200; the writ commands the performance of a duty which exists independently of the writ, is "specially enjoined by law." Code, §

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2179. This court has repeatedly decided that the canvassers cannot reject, nor inquire into the validity or sufficiency of a return. They must count the returns, and leave the question of their validity to another tribunal. *The State of Iowa, ex rel. Rice, v. The County Judge, supra*; *The State, ex rel. Byers, v. The County Judge of Floyd County*, 7 Iowa, 390; *Distrow et al. v. Smith, County Judge, et al.*, 10 Iowa, 212. "If the mandate exceed the legal obligation or duty of the defendant, it is therefore void, *Chance v. Temple*, 1 Iowa, 195; *Wright v. Marsh et al.*, 2 G. Greene, 117.

E. W. Eastman for the appellee.

I. The demurrer admits that the allegations and statements in the defendant's answer are true. *Games v. Robb*, 8 Iowa, 199; *Coffin v. Knott*, 2 G. Greene, 584; 1 Chit. Pl., 662; 1 Bour. L. Dict., Title "Demurrer."

II. Even by a replication, the judgment in the case of *The State, ex rel. Alderson, v. The County Judge of Hardin County*, cannot be reviewed in this collateral proceeding. 1 Greenl. Ev., §§ 523, 528, 531, 534, 536; *Cooper v. Sunderland*, 3 Iowa, 130; *Smith v. Kernochen*, 7 How., 215-217; *Adams v. Barnes*, 17 Mass., 367; *Voorhees v. The Bank of the United States*, 10 Pet., 472.

III. The record in the election book in the county judge's office, while it remains there, is legal upon its face, is binding upon the county judge and all the county officers. It is presumed to have been legally made. 1 Greenl. Ev., § 19; *Lee v. Cooke*, 1 Wash. R. (Vt.), 307.

IV. This court has repeatedly decided that the District Court has power by mandamus to compel a re-canvass of votes. *Price v. Waite and Harned*, 1 Iowa, 481; *The State of Iowa, ex rel. Rice, v. The County Judge of Marshall*, 7 Iowa, 158; S. C., 9 Id., 334.

V. In the case of *The State of Iowa, ex rel. Alderson, v. The County Judge of Hardin County*, notice was properly

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served, and the court acquired jurisdiction. Every presumption is in favor of the regularity of its subsequent proceedings. *Sprague v. Litherberry*, 4 McLean, 442; 1 Id., 224; *Morrow v. Weed*, 4 Iowa, 88; *Hickman v. Boffman*, Hardin, Ky., 848; *Gibson v. Foster*, 2 Ann. La., 508; *Gentile v. Foley*, 3 Id., 146; *Dallarhide v. Muscatine County*, 1 G. Greene, 158; *Wray v. Ho-ga-pa-nubby*, 10 S. and M., 452; *Linn v. Montross*, 5 Texas, 510; *Morrow v. Weed*, 4 Iowa, 87.

BALDWIN, C. J.—The facts upon which the relator bases his prayer for a writ of mandamus, are in substance set forth in the opinion of WOODWARD, J., delivered in this cause, upon a former appeal. 10 Iowa, 65. The case of *The State, ex rel. Alderson, v. The same respondents*, originated out of the same county seat controversy, and a further history of this case may be had by reference to the statement and opinion in that case, as appears in 11 Iowa, p. 11.

The judgment of the District Court upon the former appeal was reversed. Upon the return of the writ of *procedendo* from this court, the relator caused an *alias* alternative writ to issue against J. H. CUSACK, the then acting County Judge, commanding him to either remove the records of said county to Point Pleasant, or to show cause why he refused so to do. Upon the return of this writ, CUSACK, as County Judge, answered that he entered upon the duties of his office upon the 1st day of January, 1860, and that officially, he could state nothing in answer to the allegations of the petition except as to the facts that appeared of record in his office. The respondent in his answer, concedes the fact as stated in the relator's petition, that an election was held in April, 1858, upon the question of a re-location of the County seat, and that, upon the 9th day of said month, a record

¹ WRIGHT, J., having been of counsel, took no part in the determination of this cause.

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was made by the board of canvassers, in which it was declared that Point Pleasant, having received a majority of all the votes cast, was the county seat of said county.

The respondent further states, that there is another and additional record, made on the 26th day of April, 1858, by the board of canvassers, in obedience to a writ of mandamus from the District Court, which record declares that Eldora, having received a majority of all the legal votes cast at said election, shall remain the county seat of said county.

The respondent further states, that there is no paper or record in his office purporting to be the writ of mandamus, or authority by which said last mentioned record was made. That respondent had obtained from the Clerk of the District Court, a transcript of the papers and proceedings of the District Court in the case of *The State, ex rel. Anderson, v. The County Judge and others*, as canvassers, in which said writ had issued, from which it appeared that said writ had been obeyed, and in pursuance thereof the record made, declaring Eldora the county seat of said county. A full transcript of said cause is attached to, and made a part of, respondent's answer.

To this answer there was a demurrer filed, which being overruled by the court, and judgment for the respondent entered thereon, the relator appeals. Many exceptions are taken by the relator to this answer, all of which strike at the validity of the record made by the board of canvassers, under the order of the court in the case of *The State, ex rel. Alderson, v. Said canvassers*.

It is claimed that this proceeding was illegal, fraudulent and void, and that the record made by the canvassers in the election book, under the order of this void judgment, should be treated by the respondent as a nullity, and that the first canvass, and the record thereon, should govern the county judge in determining where to keep the records of

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said county. It is argued by the counsel for appellant, that the board of canvassers have no power within themselves as such board, to reject the vote of any precinct,—that it is their duty to count the votes as returned to them, and that if in the canvass in this case, the board had no power to reject the vote of a precinct, that the court had no power to compel such board to do an act the law did not authorize if to do of its own motion. The case of *Chance v. Temple*, 1 Iowa, 179, is cited in support of this position. In that case, the court was asked to compel the respondent to do an act that would have been a nullity when done, and an act the law did not require of the respondent as an officer.

We are not prepared to say that the board of canvassers must canvass every return that is made to them, and that they have no power to reject a return from any township in the county under any circumstances. It is their duty to open and examine the several returns, and make abstracts stating in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office. See § 271, Code. The returns they are to examine are required to be made in the manner pointed out in § 267, and must be returned to the county judge as provided for in § 268 of the Code.

Should it appear that a return had been made, not signed by the officers holding the election, or that it had been in the custody of a person not either a judge or clerk of such election, or that it had been abstracted from the custody of such officer and mutilated, or names added to the list of voters, or the result as written out, changed, it is certainly not the duty of the board to canvass such a return. It is not a return within the meaning of the law. If they have no authority to count such a return, they must reject it. If they fail to discharge their duty, and count a return

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which they should reject, are they not subject to the mandate of this writ, to compel them to discharge such a duty?

We do not undertake to say that the board of canvassers, after having once assembled, and canvassed the vote, and declared the result, have the power within themselves to reassemble and re-canvass the same vote, and declare a different result.

That they may be compelled, by writ of mandamus, to re-canvass and correct a mistake, has been determined by this court in the case of *Price and Wait v. Harned et al.*, 1 Iowa, 473.

Without determining, however, whether the court erred in issuing the writ of mandamus in the Alderson case, that is, whether there was such a state of facts shown as to justify the interposition of the court, or whether the relator and the canvassers colluded together for the purpose of disfranchising the voters of a portion of the county, or whether the return to the writ was made in bad faith by said board or otherwise, it is sufficient to say that the court had the power to compel the board to re-canvass, and its order to this effect is not a nullity. It cannot, therefore, be claimed that the issuance of the writ in the Alderson case, the return of canvassers, and the judgment of the court thereon is void. It is a matter over which the court could take jurisdiction. It is the judgment of a court of general jurisdiction, and as long as such judgment stands unreversed, it is binding and cannot be attacked in a collateral proceeding. *Wright v. Marsh et al.*, 2 G. Greene, 95; *Hampton et al. v. Weare et al.*, 4 Iowa, 13; *Smith v. Dubuque County, Id.*, 492.

The county judge, in this case, must be controlled by the record in the election book, in determining at what place he will keep the records of said county, and in arriving at a proper conclusion upon this question, he has no power to

De Louis v. Sage.

go behind the record, or to collaterally attack the judgment which directed the canvassers to declare the final result as appears then to have been made. Judgment

Affirmed.¹

DE LOUIS *et al.* v. SAGE.

1. DECREE RE-AFFIRMED. The decree in *Sprott v. Reed*, 3 G. Greene, 489, re-affirmed.
2. HUSBAND AND WIFE. In 1841 a decree was rendered against E. H., a *feme sole*, who, in 1844, intermarried with one H. D. L., after which an execution was issued under the decree, and the real estate of defendant therein sold to satisfy the same. The property was purchased by one G. who immediately assigned the sheriff's certificate to H. D. L. the husband, to whom the sheriff's deed was subsequently issued. *Held*, That there was no legal incapacity in the husband to acquire this property in this manner; and that as there was no evidence of fraud or bad faith, a title acquired through the conveyance to him should be sustained.

Appeal from Lee District Court.

TUESDAY, APRIL 15.

ACTION OF RIGHT. Plaintiffs claim as the heirs of Elizabeth Hunt. Defendant relies upon a title derived under certain judgments and executions. Judgment for defendant, and plaintiffs appeal.

Curtis, Gilmore & Curtis, for the appellant, relied upon the following authorities: *Ex parte Peru Iron Company*, 7 Cow., 540; *Van Rensselaer v. The Sheriff of Albany*, 1 Id., 501; *Vaughn v. Elley*, 4 Barb., 159; *Van Rensselaer v. The Sheriff of Onondaga*, 1 Cow., 443; *Everston v. Sawyer*, 2

¹ A petition for a rehearing of this cause was overruled by the court.—
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Wend., 407; *Hoghton v. Hoghton*, 11 Eng. L. & E., 134; *Cooke v. Lamotte*, Id., 26; *Ahearne v. Hogan*, 1 Dru., 310; *Espey v. Lake*, 15 L. & E., 579; *Buffaloe v. Buffaloe*, 2 Dev. & Bat., 241; *Taylor v. Taylor*, 8 How. U. S., 183; *Greenfield's Estate*, 14 Penn., 504; *Jenkins v. Pye*, 12 Pet., 249; *Keech v. Sanford*, 1 E. C. L., 53; *Broadstreet v. Platt*, 17 Wend., 44; *Sullivan v. McLenans*, 2 Iowa, 442; *McCrory v. Foster*, 1 Id., 271; *Green v. Winter*, 1 John. Ch., 27; *Winfrey v. Williams' Executors*, 5 B. Monroe, 485; Blackwell on Tax Titles, 470; *Piatt v. St. Clair's Heirs et al.*, 6 Ohio, 227; 11 Ill., 322; 1 Aiken, 306; 14 Verm., 532; *Varney v. Stephens*, 22 Mo., 331.

Samuel F. Miller and McCrary & Bruce for the appellee, cited *Sprott v. Reed*, 3 G. Greene, 489; *Jackson v. Duncan*, 16 John., 110; *Todd's Heirs v. Wickliffe*, 18 B. Monr., 906; 2 Comyn's Dig., 206, Baron and Feme, E; 1 Bac. Abr., I, 496, (marg.) 8 Watts & S., 409; 4 Rich. Eq. (S. C.), 301; 10 Id., 130; *Sheriff of Fayette v. Buckner*, 1 Litt. Ky., 126; 16 Penn., 417, 365; 18 Id., 392; 5 Gratt., 63; 2 Kent Com., 138.

WRIGHT, J.—Elizabeth Hunt, under whom both parties to this controversy claim, was one of the parties to the “decree of partition of the lands of the half-bred Sac and Fox Indians,” and by that had set off to her the property in dispute. This was in 1841. On the 6th of August, 1844, she intermarried with Henry De Louis. In November, 1844, an execution issued on this decree against Elizabeth Hunt, for costs, and in January, 1845, the property was sold by the sheriff to Isaac Galland. The sale was for more than sufficient to satisfy the execution, and the excess was paid to the husband, De Louis, “for Elizabeth Hunt,” as appears by his receipt on the writ. On the same day, Galland transferred the certificate of sale to De Louis, and authorized the officer to make him the deed when the

De Louis v. Sage.

time for redemption should expire. The deed was accordingly made to De Louis, in April, 1846. After this, Ainsworth and others recovered judgment against De Louis, and thereunder sold the property to Reeves, who conveyed to Wolcott, who conveyed to defendant.

Several points are raised and discussed by appellant's counsel, touching the decree of partition, the execution thereon, and the validity of defendant's title, so far as it depends upon that proceeding. The very same questions however, were raised, discussed, and fully examined in the case of *Reed v. Sprott*, 3 G. Greene, 489, and all decided against the position now taken by appellants. That decision was made in 1852. Under it titles have been acquired and upon it parties interested have securely rested for several years, and we are not disposed, except for the most cogent reasons, to overrule it. We see nothing in the argument of appellant to shake our confidence in the correctness of that case, and thus far, therefore, his exceptions are overruled. And see *Johnson v. Carson*, Id., 499.

But the pivotal point, and that upon which appellants principally rely, is, that De Louis, at the time of the purchase and assignment by Galland, was the husband of Elizabeth, the execution defendant, and could not thus acquire title to the lands of his wife. Under this general proposition, it is argued that Galland, by his purchase obtained merely a *lien* on the realty, that the purchase by De Louis was an extinguishment of this lien, as fully as if the wife had redeemed, that the husband was answerable for the debts of the wife, that De Louis took no title, and the purchaser under the execution against him took none, that if his title were voidable, merely, and not void, that defendant had actual notice from the record of all the facts vitiating it, that he occupied a position of trust, or one fiduciary in its character, and if he bought in the incumbrance such purchase inured to his beneficiary, and

finally, that at the time Reeves purchased, the husband was tenant by courtesy, having no other title, which terminated at his death, the appellants having the fee as the heirs of their mother.

The truth of some of these positions might be admitted, and the main proposition be unestablished. Thus if it be true that Galland had but a *lien* by his purchase, yet if there was no redemption, the lien would ripen into a title, and the property become vested in the purchaser, or his vendee. So, though the husband by the marriage might become liable for the debts of the wife, yet if he does not pay them, but acquires, in bad faith, even, a title to her property, such liability would not invalidate a title derived from him, in the hands of an innocent holder. But passing these matters, we come to the consideration of the material points involved in this controversy.

This is an action of right, in which the legal title must prevail. And defendant has this title, unless there was a legal incapacity on the part of the husband to receive it in the manner disclosed in the record. How then did he receive it? The answer is, that by certain legal proceedings the title of the wife was vested in the husband. At law, does the fact that the wife formerly held the title, invalidate that which the husband thus takes? Clearly not, for there never was any rule which prevented the husband, by proper conveyance, from holding the real property which the wife had in her own right. Of course, we speak of cases where there is good faith, or the absence of fraud. The obstacle that existed at common law was the manner of passing the title, or effectuating the intention of the parties, and did not relate to the ability of the husband to acquire and hold the property. If the rule that she was unable to contract with the husband was not violated, the husband could purchase the same, as any other person. A fine and recovery was effectual to con-

vey the wife's separate estate, and was used at times to vest it in the husband. So the wife might join her husband in making a conveyance to a third person, and their grantee convey to the husband, and thus the husband acquire a title, divested of all title originally held by her. (*Jackson v. Stephens*, 10 John., 110.) And if by valid legal proceedings he obtains this title, it will be upheld.

Suppose that Galland, in this case, had taken the sheriff's deed, and afterwards, for a valuable consideration, had conveyed to the husband, could there be any question that he would take the estate, just as if the wife never had owned it? Her title was divested by the sale and the failure to redeem; his purchase inured to his own benefit, and the property would be liable to the payment of his debts. And in what is the case different, when he purchases the certificate and takes the sheriff's deed? True, if there was fraud, the wife would have her action to reclaim her property; and if this fraud was brought home to third persons, they might be affected by it. And in that event, even, the legal title would be in the husband.

Does the fact of his liability to pay her debts, aid appellants? Who is he liable to, and who can compel him to discharge this duty? The creditor, and not the wife. Suppose her own property, then, is sold to pay her ante-nuptial debt; is the husband legally bound to redeem that property, and if, instead of doing so, he purchases it of the sheriff's vendee, is the title thereby rendered invalid in the hands of those who hold in good faith under the husband? There may be a moral obligation resting upon him to make the redemption, but none of such a legal nature as to vitiate a title that he may take to property which neither redeemed.

It only remains for us to add, that we see no such evidence of fraud in this case as to justify us in holding this title invalid in the hands of defendant. Whatever may have been the husband's motive in the transaction, however,

Perrin v. Griffith.

corruptly or fraudulently he may have acted, knowledge thereof is not brought home to Reeves, nor those holding under him. The judgment is

Affirmed.

PERRIN V. GRIFFITH *et al.*

1. SCHOOL LANDS: PRE-EMPTION. A right to pre-empt school lands belonging to the 500,000 acre grant is not expressly given by the language of § 1070 of the Code of 1851; neither can such right be implied from the language employed therein.

Appeal from Butler District Court.

TUESDAY, APRIL 15.

FOR the facts see the opinion of the court.

Fletcher and Bannon for the appellant.

J. O. Crosby for the appellee.

BALDWIN, C. J.—The respondent Griffith, as the School Fund Commissioner of Butler county, sold to Robert T. Crowell *et al.* a portion of the land known as the 500,000 acres land grant, and for the land thus sold the purchaser received from the State of Iowa a deed made in accordance with the law.

The complainant asks that this sale may be set aside, the deed canceled, and an order or decree of court be made permitting him to purchase the said tract of land at \$1.25 per acre. The complainant claims that he had made certain improvements upon this land prior to its selection by the agents of the state under the said land grant, and that by virtue of the law in force when such selection was made,

he had a right to claim and preëempt the same at \$1.25 per acre; that the respondents were well advised of his claim to said land; that they, intending to defraud the complainant out of his right to purchase the said claims, procured an order from the Superintendent of Public Instruction, directing the said Commissioner to sell said land to the respondents; that the sale was so made without notice and without regard to the rights of the complainant.

The respondents answer, and each deny the allegations of fraud; deny the right of complainant to preëempt any portion of said land; claim that the sale was made in compliance with the provisions of the law. The respondents, Crowell and others, further claim that if said land subject to preëemption, and that if improvements thereon, and occupancy, give to such occupant any prior rights to purchase said land, that the respondents are entitled to preëempt the same, as it is claimed that they had a preëemption thereon prior in time to that of the complainant. The cause was determined in the court below in favor of respondents, the bill dismissed, and complainant appeals.

The controlling question in the case is, whether there is any provision of the statute recognizing the right of persons to preëempt any portion of this land grant, for unless such right is given by some special statutory enactment, it is conceded that none exists. The provisions of the law in reference to the selection and sale of this land grant are embraced in the act of the Legislature Session, Laws of 1848. See Code, pp. 168 and 169. By § 1070, it is provided that the Superintendent of Public Instruction may authorize the sale of any portion of said land at any rate he may determine, not less than the minimum price fixed thereon by the selecting agent, upon *the terms* prescribed in the act of February, 1847, entitled "An Act to provide for the management and disposition of the school fund."

The act of 1847 clearly recognizes the right of settlers upon the sixteenth sections to preëempt the land upon which their improvements are located. It is claimed in argument that the provisions of the act of 1848 (§ 1070 of the Code), authorize the disposition of the 500,000 acre grant in the same manner as that of the sixteenth section, and that if preëmptions are allowed upon the latter they are upon the former, if not in express terms, at least by implication.

Under the act of 1847, in reference to the sixteenth section, after directing the manner in which the land shall be sold, *the terms* upon which such sales shall be made are fixed by the express language of the act,—that is, one-fourth of the purchase money must be paid down, and the balance upon time, at interest.

Under the act in reference to the 500,000 acre grant, the manner in which the sale should be made is pointed out. That is, it is to be sold by order of the superintendent, &c., as above stated; but such lands must be sold upon the *same terms* as fixed for the sale of the sixteenth section. *Terms*, as here used, refers to the price and time of payment, and not to the manner of sale. No right to preëempt is expressly given by this statute, and we cannot conceive how it can be implied from the language used.

Even if such right existed we are unable to determine that the claim of the complainant was prior to that of the respondents. The testimony upon this point is very voluminous, and after a careful inspection of the same, we think the respondents show equally as good if not a better right to preëempt the land than the complainant.

The fraud charged is not supported by the proof.

The judgment is, therefore,

Affirmed.

Gower v. Halloway.

GOWER V. HALLOWAY *et al.*

1. NOVATION: DISCHARGE OF SURETY: The novation of a debt without the knowledge of a surety discharges the liability of such surety.

Appeal from Johnson District Court.

WEDNESDAY, APRIL 16.

THE facts are stated in the opinion of the court.

Clark & Davis for the appellant, relied upon *Edwards* on Bills and Prom. Notes, 192, and note 193, and 219; 5 Wend., 490; *Kasson v. Smith*, 8 Wend., 437; *Smith v. Beckett*, 13 East., 186.

Clark & Bro. for the appellee.

BALDWIN, C. J.—The defendants borrowed of one E. C. Lyon the sum of two hundred and fifty dollars, and executed to him their promissory note therefor, payable one year after date. Gower Brothers & Co. signed this note as security. To indemnify their indorser against any loss they might sustain by the signing of said note, as security, the defendants executed to said Gower Brothers & Co. their joint promissory note in the sum of three hundred dollars, payable at the time the note to Lyon became due.

About the time of the maturity of the note to Lyon, Halloway placed money in the hands of Hemmingway, his co-obligor, sufficient to pay the one-half of the money due to Lyon. Hemmingway paid to Lyon the interest, and, desiring the use of the money for a longer time, made an arrangement with Lyon, by which the time of payment was to be extended. The note signed by the defendants to Lyon, and indorsed by Gower Brothers & Co., was given up. A new note was executed, signed by Hemmingway, as principal, and Gower Brothers & Co. and one Cava-

13	154
79	308
13	154
82	750
13	154
132	342

naugh as sureties. The sureties had their note to pay, and it is now claimed by plaintiff as the assignee of Gower Brother & Co., that defendants are liable upon their contract of indemnity for the amount the sureties were required to pay Lyon upon the new note.

The Court by its refusal to instruct the jury as requested by defendant Halloway, and by its instructions given at the request of plaintiff, and upon its own motion, in effect directed the jury that the act of the parties, in substituting the new note to Lyon in the place of the one signed by defendants, and the destruction or cancellation of the note for which the money was originally borrowed, did not release the defendant Halloway, or, in other words, that defendant Halloway was not released from his bond of indemnity until the original debt was paid.

We are of the opinion that the court erred in its view of the law that governs this case. The contract sued upon was in the nature of a security, a guaranty, that the note to Lyon should be paid at maturity, or that the plaintiff should be held free from all liability thereon. Has this obligation been violated by Halloway, or by the defendants, jointly? It is not important to consider the effect of the payment, by Halloway to his co-obligor, the money for the purpose of discharging his part of the liability. It is apparent, we think, that there was a new contract entered into for the extension of the time of the payment of the note on which Halloway was liable. This was done by the consent of Gower and Brother, and without any assent thereto, or knowledge of the same, upon the part of Halloway. The note upon which Halloway agreed to save the plaintiff from liability, was paid. The parties had no right to renew the note without the knowledge or consent of all the parties bound thereby, unless with the design of releasing those not parties to such a change.

It is argued, by the counsel for the appellee, that the

giving of the new note did not change the character of the original indebtedness,—and that the only mode in which Halloway could be released from liability to Gower, was by the payment in full of the original indebtedness to Lyon. This would be true, had not the security, Gower, by his own act, released the defendant from liability on the note.

The general rule is, that the giving of a bill of exchange or a promissory note for goods sold, or for an existing contract, is not to be regarded as payment of the indebtedness, unless there is an express agreement to that effect. The authorities, however, says Mr. Edwards, are not uniform on this subject. But was there not an express agreement by Lyon to receive the new note in payment of the old one? If so, was this agreement not participated in by the plaintiff? The old note was given up and destroyed; this was done by the consent of the parties thereto. By the acceptance of the new note, signed by Gower, as surety without the name of appellant, the original debtor, being affixed thereto, certainly indicates the assent of the plaintiff to the release of Halloway.

As before stated, the appellant, by his note to plaintiff, stood in the position of a guarantor, and it is a general rule that whatever discharges the contract of the principal discharges that of the surety. A surety is discharged by the novation of the debt, for he can no longer be bound for the first debt for which he was surety, since it no longer exists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt was not the debt to which he acceded. See Edwards on Bills, 218.

Holding, as we do, that the contract of Halloway with plaintiff was that of a surety, and we can conceive of no other legal relation he can bear to plaintiff, by virtue of the contract sued upon, the rights of the parties must be determined upon the principles of law which govern the liability

Wilkinson v. Getty.

of securities. The act of the plaintiff, by the novation of the contract, released the appellant Halloway. The judgment is therefore

Reversed.

WILKINSON V. GETTY *et al.*

1. **EXECUTION OF POWER.** The non-execution of a power cannot be aided by proof of an intention to execute it.
2. **SAME.** When an attorney in fact, acting under a power of attorney executed by both husband and wife, signed a deed of conveyance as the attorney of the husband only, it was held: 1. That the deed operated to convey only the husband's interest, and did not bar the dower of the wife; 2. That the failure to execute the deed, as the attorney of the wife could not be aided by evidence showing a mistake on the part of the attorney in drawing the deed.

Appeal from Scott District Court.

WEDNESDAY, APRIL 16.

ON the 31st of March, 1849, John Getty was the owner in fee of a lot in the city of Davenport. He, on that day, with his wife, Harriet, executed a power of attorney to one Collins, empowering him in their name to sell and convey this lot. Collins sold the property to one Ranson, and afterwards, by deed of October 29, 1850, undertook to convey the same to one Price, the assignee of Ranson. This deed was signed thus: "Wm. S. Collins, Attorney in fact for John Getty." Price sold to Pages, under whom complainant claims. Getty died in 1858, leaving Harriet surviving. This bill is filed, against his heirs and widow, to perfect the title; was sustained as against the heirs, and dismissed as to said Harriet. Complainant appeals.

Davison & True, for the appellant, cited 1 Story Eq. Jur., §§ 152-159; *Gillespie v. Moore*, 2 John. Ch., 585; *Keiselbrack v. Livingston*, 4 Id., 148; *Wiser v. Blackley*, 1 Id., 609; 1

Sug. Ven., 182, and note; *Peterson v. Grover*, 20 Me., 368; *Ring v. Ashworth et al.*, 3 Iowa, 452; *Hunt v. Rousmanier*, 8 Wheat., 211; S. C., 1 Pet., 13; *Tilton v. Tilton*, 9 N. H., 392; 1 Story Eq., §§ 95, 115, 169, 170 and note, and 171; Sug. on Powers, 366, 372, 374, 361; Fonb. Eq., 40, 201; Pow. on Mort., 161; 1 Am. L. C., 584; *Martin v. Flowers*, 8 Leigh., 162; *Webster v. Harris*, 16 Ohio, 490; *Chesnut v. Francis, Lessee, Id.*, 599; *Smith v. Handy, Id.*, 191; *Baker v. Childs*, 2 Verm., 61; *Downey v. Hotchkiss*, 2 Day, 225; *McCall v. McCall*, 3 Id., 482.

Thompson and Barner, for the appellants, relied upon *Carr v. Williams et al.*, 10 Ohio, 305; *Connell v. Connell*, 6 Id., 358; *Silliman v. Cummins*, 13 Id., 116; *Good v. Gercher*, 12 Id., 364; *Maddock v. Williams, Id.*, 386; *McFarland v. Fubijer*, 7 Id., 194; *Catlin v. Ware*, 9 Mass., 218; *Lufkin v. Curtis*, 18 Id., 228; *Powell v. Manco*, 3 Mason, 347; *Martin v. Develly*, 5 Wend., 9; *Butler & Atwater v. Buckingham*, 5 Cow., 492.

WRIGHT, J. This decree must be affirmed. The wife never signed the deed. Nor, (granting that this could avail complainant,) is there any sufficient evidence that she ever intended to, either by her attorney in fact or otherwise. It is not different from the ordinary case, where the husband makes a deed in which the wife does not join. Her dower, in such a case, is not barred by even a superabundance of proof that the grantee believed and expected that she was signing it; that she was willing to sign it at the time, and would have done so, if required; nor by evidence that a full consideration was paid, and possession taken under the deed. In this instance, it is simply a case of the non-execution of a power, and this cannot be aided by proof of an intention to execute it.

It is not a case of mistake, relievable in equity. Respondent was a *feme covert*, and her dower could only be barred

by her voluntary act or conveyance in the manner provided by statute. And when required to be in writing, the failure cannot be aided by parol evidence that all that the statute required was in fact done. (*O'Ferrall v. Simplot*, 4 Iowa, 381, and cases there cited. And see *Pierson v. Armstrong*, 1 Id., 282.) And much stronger is the reason of the rule, when she never signed nor acknowledged the deed.

Counsel say that equity will especially grant relief and correct a mistake, when the deed is executed in the name of the attorney, instead of the principal. We know of no such rule, in the form stated. Nor, if correct, could it avail complainant. The author, in 1 Am. Lead. Cas., 585, (referred to by counsel in support of this doctrine,) is treating of cases where equity will aid the defective execution of a power, and refers to instances where deeds are by mistake signed, sealed and delivered in the name of the attorney, instead of the principal. And the rule is broadly stated, that an agreement by an attorney for a principal, inoperative at law for want of a formal execution, in the name of the principal, is binding in equity, if the attorney had authority. But not so, if the agreement was never executed, formally or otherwise, in the name of the principal, nor any person for him. And this is the case before us.

But it is insisted that Collins made to the vendee a bond, executed in the name of the husband and wife, and that equity will enforce this agreement. Of the execution and true character of this bond, there is no sufficient evidence. To obtain relief upon this ground, complainant's proof of the contract should be clear, definite, and unequivocal. The alleged bond is not produced, and the evidence of its terms and contents falls far short of what legal rules require.

Affirmed.

Wheelhouse v. Bryant.

WHEELHOUSE v. BRYANT *et al.*

1. ADMINISTRATOR'S BONDS: JURISDICTION. The District Court has original jurisdiction of actions for breaches of the conditions of administrator's bonds.
2. SAME: COUNTY COURT. While the County Court may, in the summary manner provided by §§ 1387-9 of the Code of 1851, enforce compliance with an order directing an administrator to make payments in accordance with the prior order of the court, such court does not have exclusive jurisdiction.

Appeal from Polk District Court.

WEDNESDAY, APRIL 16.

ACTION on an administrator's bond. The petition sets out the death of the intestate, the appointment of the defendant, Bryant, as administrator of his estate, and the execution of the bond in suit by both of the defendants. The petition further avers that the administrator has received money, goods, chattels, wares and merchandise, rights, credits and choses in action, the property of said decedent, to the value of twelve hundred dollars; and that the covenants and conditions of said bond have been broken in this — that the said administrator has never made any inventory or return of said property, to the County Court in the manner prescribed by law; that he has refused to set off to the plaintiff, who is the widow of the decedent, such property as by law she was entitled to, but on the contrary, converted such property to his own use; that he did not report his proceedings as administrator within one year from his appointment, nor at any other time; that he did not make settlement as by law required, and pay over the sum due the plaintiff; that he has not managed the business of the administration with a view to the interests of the estate; and that he has refused to obey an order of the Probate Court requiring him to account and pay over

the moneys, property, &c., belonging to the estate, and remaining in his hands. To this petition there was a demurrer for causes presented in the opinion of the court. The demurrer was sustained, and the plaintiff appeals.

Brown & Sibley for the appellant.

The first ground of demurrer is, that the District Court had no jurisdiction in such an action, save on appeal from the County Court. We affirm that the District Court had jurisdiction.

1. The District Court is one of superior or general jurisdiction, and is the only such court in this state of original jurisdiction. Const., art. 5, secs. 1, 6; Code of 1851, sec. 1576.

2. Nothing shall be intended to be out of the jurisdiction of a superior court, save what especially appears so. *Cooper v. Sunderland*, 3 Iowa, 125; 1 Smith's L. C. (5th ed.), 816; 822, 848, and the cases there cited; *Peacock v. Bell*, 1 Saund., 74.

3. The Code does not take away the jurisdiction of the District Court. Concurrent jurisdiction is conferred upon the County Court in certain cases. Code of 1851, sections 138, 1887-1889.

4. Courts of general jurisdiction have ever taken cognizance of this class of cases, as in *Anderson v. Vance et al.*, Morris, 436, where no question is made as to the jurisdiction; *Eaton v. Beerfield*, 2 Blackf., 52; *Matthews v. Page*, Brayt., 106; *Edeler v. The State*, 4 Gil. and John., 277; *Boston v. Boylston*, 4 Mass., 818; *Judge of Probate v. Fillmore*, 1 Chip., 420; *The People v. Duncan*, 1 John., 311; *Dickerson v. Robinson*, 1 Halst., 195; 2 Har. & John., 38; 3 Id., 503.

*McHenry*s for the appellee, cited *Fotiaux v. Lepage*, 6 Iowa, 123; *Childs, Sandford & Co. v. John Hyde & Co.*, 10 Id., 294; and contended that *Cooper v. Sunderland*, 3 Id.,

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123; *Peacock v. Bell*, 1 Saund., 74; 4 Mass., 318; and *Eaton v. Beerfield*, 2 Blackf., 52, are not applicable.

LOWE, J.—Suit on administrator's bond, which ended in sustaining a demurrer to plaintiff's petition, and dismissing the cause, upon the ground that the District Court had no original jurisdiction of this class or character of cases, but only appellate, when the cause is transferred by appeal from the court of the judge of probate for revision or correction. This, we think, is simply a misapprehension. The judge of probate, to be sure, has jurisdiction over the administration and settlement of the estates of decedents; but there is nothing in the statutes defining the duties and powers of this tribunal, that gives it the exclusive jurisdiction over the various delinquencies for which an administrator is liable on his bond, and unless there is some such express provision, the general original jurisdiction of the District Court over the subject in controversy cannot be affected. The rule upon this point, heretofore recognized by this court (3d Iowa, 125), and other courts and elementary law writers, is: "That nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears so." There are some defaults or failures in regard to which, without doubt, the two courts have concurrent jurisdiction in a proceeding upon the bonds.

Sections 1387-8-9 authorize the judge of probate where there has been a failure to make payment of any kind in accordance with the order of the court, to summon the administrator and his sureties on the bond before him, at a time to be specified, to show cause why they have failed to comply with his order; if no sufficient cause can be shown, the court has power to render a judgment on the bond for the amount of money directed to be paid, and may issue execution accordingly.

This power was wisely conferred upon the judge of probate, to enable him to make effectual an order which had been previously entered in regard to the payment of money on hearing, and upon settlement found to be in the hands of the executor. We are to suppose that the executor was satisfied with the order, otherwise he would have appealed, as it was his privilege to do.

Having had then a hearing upon the order made, and taking no exception to the same, should the parties entitled to receive the money be left entirely to the mercy of the executor to comply, or not to comply with said order, according to his own pleasure? Certainly not; and while the wisdom of the summary remedy prescribed in the sections of the Code referred to, for forfeitures of that particular class is to be commended, it by no means follows that the Probate Court has exclusive jurisdiction over all the delinquencies which an executor may be responsible for on his bond.

Suppose the executor complies with all the orders and requirements of the Probate Court, but creditors, or heirs of the estate, should nevertheless be satisfied that he had been faithless in the management of the estate and the discharge of his trusts, and that they had sustained a loss in consequence thereof, would they be restricted in their remedy on the bond to the jurisdiction of the Probate Court in the first instance, where neither they, nor indeed the defendants could have the benefit of a jury trial upon so grave an inquiry?

It seems to us that no just interpretation of the statute defining the powers and duties of our several courts, can lead to the conclusion that the litigation of their rights has been withdrawn from the general jurisdiction of the District Courts.

There were other grounds of demurrer assigned, not insisted upon however in this court, for the reason, perhaps,

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that they do not come within any of the causes enumerated in the Code of 1860, or the proper subjects of a demurrer.

The judgment below being reversed, the case is remanded.

Reversed.

RAMSEY V. COOLBAUGH & BROOKS.

1. **ACT OF CONGRESS CONSTRUED: SPECIAL BAIL.** The "special bail" contemplated by § 11, of the Judiciary Act of 1789, does not include delivery bonds executed to discharge property from the levy of a writ of attachment.
2. **SAME: EFFECT OF REMOVAL ON BOND.** The removal of a cause from a State to a Federal court, in accordance with the provisions of the Judiciary Act of 1789, does not of itself have the effect to render a delivery bond already filed in the cause inoperative; neither does such removal so enlarge or change the obligation of the sureties on such bond as to discharge them.
3. **SAME.** The undertaking of the obligors on such a bond is not limited to the sheriff serving the process. It is for the benefit of the real parties in interest, and requires them to deliver the property to the officer who has the final process.
4. **SUBSTITUTION OF BONDS.** Courts of general jurisdiction have, for purposes of substitution, full power over bonds filed on mesne process, and an order permitting the withdrawal of one filed upon the performance of certain acts to keep intact the security, is not a "further proceeding" in a cause within the meaning of the Judiciary Act of 1789.

Appeal from Henry District Court.

THURSDAY, APRIL 17.

On the 26th day of January, 1856, plaintiff sued one McFaul in the District Court of Des Moines county, and obtained an attachment, which was levied upon some \$30,000 worth of pork. McFaul was a non-resident of the state, and was not served. On the 29th of that month, McFaul released

this property by executing a delivery bond, with defendants, Coolbaugh & Brooks, as his sureties. This bond was payable to plaintiff, and in the form required by the statute. In April, 1856, McFaul appeared by his attorney, and filed his petition for the removal of the cause to the United States District Court for the district of Iowa, showing that the amount in value was over \$500, and that the parties were residents of different states. The State Court ordered the removal, as shown by the following entry :

"The defendant in this case, having, at the time he entered his appearance to this suit, made it appear to the satisfaction of the court that the plaintiff, James C. Ramsey, is and was at the commencement of this suit a citizen of the State of Iowa, and that said defendant, Eneas McFaul, is and was at the time of the commencement of this suit a citizen of the State of Missouri; and having at the same time filed his petition for the removal of said cause, for trial, into the District Court of the United States, to be held in the southern division of the District Court of Iowa, and having offered and given good and sufficient security for his entering, in said court, on the first day of its session, copies of said process and cause against him, and also for his then appearing and giving good and sufficient security for the return and delivery of the property attached, or its appraised value, to answer any judgment that may be rendered against him, in the same form and to the same effect as he is now held in this court. It is therefore ordered by the court that this cause proceed no further, and that the same be removed, in accordance with the prayer of said defendant, to the District Court of the United States, for the southern division of the district of Iowa, and it is further ordered by the court, that whenever the removal of said cause to said United States District Court is perfected by said defendant, by filing in said court the copies aforesaid, and making and executing the bond aforesaid, that said defendant have

leave to withdraw from the files of this court the indemnifying bond heretofore executed by him in this cause."

The bond thus given by McFaul for entering said cause, &c., was signed by himself, with Warren and Thomas as his sureties. McFaul did enter the suit in the District Court of the United States, as required, and filed his bond "to comply with the conditions of his undertaking," in the State Court, signed by the same sureties, which bond was duly approved, the sureties having justified. This bond, among other things, contains this recital: "This bond is intended to be, and is substituted, in lieu of said bond so given in said proceedings in the State Court." The bond signed by Coolbaugh & Brooks, the one now in suit, was delivered to McFaul, by the clerk of the State Court, to be canceled, and was exhibited to the sureties, who erased their names, believing themselves discharged. The sureties, at that time, had ample indemnity, which they then delivered to McFaul. In May, 1856, Ramsey recovered judgment against McFaul for near \$19,000. The cause was taken to the Supreme Court of the United States, a *supersedeas* bond filed, with Warren and Thomas as sureties, and the judgment affirmed in 1858. In September, 1857, McFaul, Warren and Thomas became insolvent, and have continued so ever since. Coolbaugh & Brooks had no notice of any claim by plaintiff against them, on said bond until near the 1st of December, 1858. The Marshal, under an execution, demanded from them the property attached, or its appraised value, which was refused, and this action was commenced on the bond. The cause was submitted to the judge below, who found the above facts, and also that the counsel for Ramsey were present in court at the time of making the orders above stated.

Judgment for defendants, and plaintiff appeals.

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Rankin & Miller for the appellants, contended :

1. That the Federal Court did not discharge or release the defendants from their obligation, nor did it intend to do so. 2. That the action of the State Court on that subject was *coram non judice*, and therefore void. 3. That all the subsequent proceedings of the parties, of the clerk, or of the court, being based upon this void order, have no effect in releasing defendants from their obligation: and in support of these propositions cited: Judiciary Act of 1789, 1 Stat. at Large, p. 79; *Gordon v. Longest*, 16 Pet. 105; *Karouse v. Martin*, 15 How., 198; *The State of Iowa v. Church*, 8 Iowa, 257.

David Rorer and *Charles H. Phelps* for the appellee.

The defendants, Coolbaugh & Brooks, are mere securities. Securities on bonds are only holden *strictissimi juris*. "If there be securities bound by them, and the meaning is doubtful, the construction is restricted and made most favorable to the sureties." And "when the undertaking is general, it shall be restrained, and its obligatory force limited within the recitals." *Bell et al. v. Bruin*, 1 How. 186; *Arlington v. Merricke*, 3 Saund., 403, 413, 414; *Liverpool Waterworks Co. v. Atkinson*, 5 East., 507; *Wardens, &c., v. Bostwick*, 2 Bos. & P., 175; *Leadly v. Evans*, 2 Bing. R., 32; *Pepin v. Cooper*, 2 Barn. & A., 431; *Barker v. Pyott & Parker*, 1 Term R., 287; *Strange v. Lee*, 3 East., 484, 490; *Leggett v. Humphreys*, 21 How., 76; *Miller v. Stewart*, 4 Wash. C. C., 29; *McGuinniss v. The Bank of the United States*, 12 Wheat., 511; *The United States v. Boyd*, 15 Pet., 187; *Walsh v. Bailey*, 10 John., 186.

This bond never contemplated a suit in the District Court of the United States. By removal to the Federal courts, the cause became a new suit, and this bond was rendered inoperative. *Martin v. Karouse*, 1 Blatch. C. C., 148, 150; *McLead v. Duncan*, 5 McLean, 142; *Thomp. v.*

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Young, 2 Ohio, 384; *Rany and another v. The Governor*, 4 Blackf.; *The United States v. Kirkpatrick*, 9 Wheat., 720; *The United States v. Howard and Howard*, 4 Wash. C. C., 96; *Armstrong & Case v. The United States*, 1 Pet. C. C. R., 46; *The United States v. Morgan & Farquhar*, 3 Wash. C. C.; *Toland v. Sprague*, 12 Pet., 327; *Jones v. Peasley*, 3 G. Greene, 42; *Brown v. Clarke*, 4 How., 4; *Austin, & Co. v. Burgett*, 10 Iowa, 302; *Woodward v. Adams*, 9 Id., 474; *Sadlier v. Fallen*, 2 Curtis C. C., 579; *Levi v. Fitzpatrick*, 15 Pet., 171; *McKay v. Donald*, 5 Ala., 388; *Tarver v. Fauce*, 5 Ala., 712; *Commonwealth v. Simmington*, 1 Watts, 310; *Pybus v. Gibbs*, 38 L. & E. R., 57; *Laftin v. Fowler*, 18 John, 335; *Gray v. Gildeierze*, 7 Rich. S. C., 168; *Brown v. Dillahunt*, 4 Smede & M., 113; *Bell et al. v. Bruen*, 1 How., 186; *Holland v. Bouldin*, 4 Monr., 150.

The plaintiff having availed himself of the change in the United States Court, to proceed to trial and judgment against McFaul without objection, is bound by the terms thereof. These defendants having acted on the faith of those terms, in delivering up their indemnity, plaintiff is estopped to deny the validity thereof; it would be a fraud. *Simons v. Steele*, 36 N. H., 73; *Hicks et al. v. Cram et al.*, 17 Verm., 449; *Orocker v. Lashbrook*, 5 Monr., 544; *Kelly v. Dexter*, 15 Verm., 810; *Kinney v. Farnsworth*, 17 Conn., 355; *Banks et al. v. Tract Society*, 4 Sand. Ch. R., 438; *Lovelady v. Davis* (4 George), 33 Miss., 577; *Blodgatt v. Blackford*, 30 Verm., 731.

The liability of the sureties on the bond in question is created by the statute of the state, and as there was no law of Iowa authorizing the removal of causes from the state to the Federal courts, such removal does not carry the liability of the sureties on a delivery bond, beyond the jurisdiction of the state courts. Pars. Cont., 81; *The United States v. Monson*, 1 Gall. C. C. R., 5; *Shelby v. Guy*, 11 Wheat., 361 (6 Pet. Cond. R., 348); *Elmandorf v. Taylor*,

6 Pet. Cond. R., 47; *McKeen v. Delaney's Heirs*, 5 Cranch, 22 (2 Pet. Cond. R. 89).

The bond is a statutory security on *mesne* process over which courts of general jurisdiction have complete and absolute power. Cow. & Hill's Notes to Phill. Ev., pt. 1, 89, 814; *Allen v. Hawks*, 13 Pick., 84; *Leggett v. Boyd*, 13 Wend., 879; *Irwin v. Caryell*, 8 John.; 1 Phill. Ev., 161 (3d edition); *Hammill v. Griffin*, 3 G. Greene, 207; *Bailey v. Hole*, 3 Carr. & Payne, 560.

WRIGHT, J.—The respective claims of the parties to this important controversy, may be stated thus: Appellant insists that the action of the State Court in reference to the new bond, and its effect upon the first sureties, was *coram non judice* and void, that the Federal Court did not discharge the defendants from their obligation, nor intend to do so, and that all proceedings by parties, clerk or court, based upon the void order aforesaid, could not discharge these sureties from their liability. Appellees insist, on the other hand, that this order was not void, that they are sureties, that they were only bound by the recitals in the bond to have the property forthcoming to the sheriff, and to answer the judgment of the State Court, and that the subsequent removal of the cause to the Federal Court released them, because it enlarged or changed their liability, or the *status* of the case, as it stood at the time they signed the bond. It is also insisted that by the said removal this bond became inoperative, that thereby the attachment was dissolved, that the bond was in the nature of "bail," and that the law of Congress required a new undertaking, in lieu of that given to the sheriff. And finally, that defendants, having acted in good faith, upon the action of the court, in delivering up their indemnity, plaintiff is estopped from denying the validity of the new bond—that to permit it would be a fraud upon their rights.

The Judiciary Act of 1789, under which the cause was

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removed to the Federal Court, provides, that in an action by a citizen of the state in which the suit is brought, against a citizen of another state, for a sum of five hundred dollars, or over: "If the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending," * * * * * "and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and said copies being entered as aforesaid in said court of the United States, the cause shall proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of the state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced." (1 Stat. at Large, 79.)

In giving a construction to this statute, so far as necessary to the disposition of this cause, we remark:

First. The special bail therein mentioned does not refer to a delivery bond, or bond executed for the forthcoming of property attached by the sheriff in the State Court. It is correctly claimed by appellant that "bail" as here used means an undertaking for the personal appearance of a party, or refers to one who may undertake for another. A delivery bond is not special bail. There is a wide distinction between the two obligations upon general principles, and this distinction is clearly recognized by the act

under consideration, for that expressly provides for the entering of "special bail," and for the effect of the removal upon the property attached. The property is to be held, but upon the entering of special bail that originally taken is discharged. Bail saves a man from imprisonment, his friends undertaking for him that he shall appear at a day certain, "and answer whatever shall be objected to him in a legal way." (1 Bac. Abr., 321.) And this is the kind of bail meant by this statute, and not bonds for the delivery of attached property.

Second. Nor are we of the opinion that the removal of the cause into the Federal Court, under this statute, would, *ipso facto*, in the language of defendants' counsel, render the bond inoperative—nor did it so enlarge or change their liability as to discharge them. Taking it for granted, as they claim, that as the cause stood at the time this bond was given, it could not be removed, because being a suit by foreign attachment, the Federal Court could not take jurisdiction of it, the fact would still remain that the subsequent appearance of the defendant to the action would remove all difficulty, and give the jurisdiction, if he applied for and obtained a change of tribunals in the manner pointed out by law. His right to do this was as much a part of the law of the contract entered into by these defendants, as his right to a change of venue to another county or judicial district in this state. Their undertaking was that the property should be forthcoming to answer "the judgment of the court in said suit." Not, as claimed by appellees, the court in which the action was then pending, alone, but the court having jurisdiction, which finally rendered the judgment. Neither was their undertaking limited to the sheriff serving the process, as obligee, but it was for the benefit of the plaintiff, the real party in interest, and required them to deliver it to the officer (sheriff or marshal) who had the final process.

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Third. But the cardinal point in the case remains to be considered, and that is, the effect to be given to the order for the substituted security. As we have seen, the language of the law is that "it shall then be the duty of the State Court to accept the security and *proceed no further in the cause.*" The argument of appellant is that this order is utterly void, because made after the court had ceased to have jurisdiction of the cause, — that when the security was accepted that court had no power to proceed further in the suit. As applied to the facts and actual circumstances of this case, we do not think this position tenable.

The argument drawn from the object and purpose of the law of Congress does not strike us as having much weight. This policy is very clearly stated by Justice McLEAN, in *Gordon v. Longest*, 16 Pet., 105, and is said to be to create a court in which a party litigating with a man in his own home and neighborhood may have a tribunal free from local influences. Manifestly, therefore, when the citizenship in another state, and the amount in controversy, are made to appear, and the offer made of sufficient surety for appearance in the Federal Court, the power of the State Court to take cognizance of the action so as to try it, or to adjudicate any question touching the merits of the controversy, is at an end. And if the State Court should disregard such application, and proceed to hear the case, this would be an unwarranted exercise of jurisdiction, and the whole proceeding would be void. The case above cited, and that of *Kanouse v. Martin*, 15 How., 198, referred to by counsel, substantially recognize this rule, and do not go beyond it. Here is a case, however, where a bond, statutory in its character, was given on *mesne process*. Plaintiff had no special vested right to these particular sureties. Before the property could be released from the process, the law required a bond. This was for the plaintiff's benefit; this was his right. The sureties may be changed, and others, subject to

the approval of the court, substituted. Over these bonds, for purposes of substitution, courts of general jurisdiction have complete power. An order for such substitution; or, as in this case, that upon the performance of a certain act, (which was to keep intact plaintiff's security,) this bond might be withdrawn from the files, is not a further proceeding in a cause, within the meaning of the act in question.

Again, we are not to lose sight of the fact that the contemplated bond was given. This was filed in the Federal Court, and approved by the judge thereof. A recitation in the new bond is, that it "is intended to be and is substituted in lieu" of the one now in suit. The records in this court show that the defendant produced a transcript of the papers, "and filed his bond to comply with the conditions of his undertaking in the court below," (the securities therein having justified,) that the bond was approved, and thereupon the papers were filed, and "cause docketed, according to law." These proceedings, in our opinion, are fairly susceptible of but one construction, and that is, that the second bond was accepted and approved by the Federal Court as a substitute for and in the place of that previously given. They mean more than that the judge approved the form of the bond, and the sufficiency of the security. The order of the court below was a part of the record produced; the purpose of the new bond was shown by that, as well as by its terms. This bond is accepted, the papers filed, and the cause docketed. Such a bond, according to the order, was required, as a condition precedent to entering the record in the Federal Court. All these matters the judicial mind must reasonably have passed upon, and the acceptance of the new bond, and ordering the papers filed and cause docketed, in legal effect as fully released the first bond, as if an order to that effect had been made by the court. And when it is borne in mind that plaintiff was present by his counsel when this bond was received, as well as when the

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order was made in the State Court, — that this bond was withdrawn and produced to defendants, who in good faith erased their names, and surrendered the ample indemnity in their hands, and that no claim was made upon them until two years and six months after the making of the new bond, — we say, when all these facts are taken into the account, it seems to us that it would be a fraud upon them to say that they are still bound to produce the property attached, or its appraised value. There is nothing tending to show that they have acted otherwise than in the utmost good faith. They had a right to rely upon the action of the two courts, as giving to them an acquittance from their obligation. It is fairly apparent that plaintiff knew that defendants had reasonable grounds to believe that these proceedings released them, and he should not now be allowed to complain of that which he permitted, if he did not produce.

Affirmed.

PERRY v. KEARNS.

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1. USURY: WHO MAY PLEAD. The grantee of real estate cannot without the consent of the grantor, interpose a plea of usury to a proceeding to foreclose a mortgage executed by such grantor; following *Hollingsworth v. Swickard*, 10 Iowa, 385; *Frost v. Shaw*, Id., 491; *Powell v. Hunt*, 11 Id., 491.

Appeal from Clark District Court.

THURSDAY, APRIL 17.

INJUNCTION. The petition shows that on the 3d day of June, 1856, one Webster borrowed of Kearns the sum of one thousand dollars, for the use of which he agreed to pay interest at usurious rates. Webster executed his note for a

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sum equal to the principal and the usurious interest, and secured the same by executing a mortgage on certain real estate. This real estate was subsequently sold by Webster to plaintiff, and conveyed by deed of general warranty. The plaintiff in this proceeding sought to enjoin the foreclosure of the mortgage for the usurious interest which formed a part of the balance due on the note from Webster, his grantor, to the defendant. The injunction was granted, and from a judgment of the court overruling a motion to dissolve it, the defendant appeals.

Casady v. Polk for the appellant, relied upon *Hollingsworth v. Swickard*, 10 Iowa, 385; *Frost v. Shaw*, Id., 491; *Powell v. Hunt*, 11 Id., 430.

T. B. Perry for the appellee, contended that there is a privity of contract between the borrower and his grantee, citing *Floyd v. Scott*, 4 Pet., 205; *Trumbs v. Blizzard and Jacobs*, 6 Gil. & John., 20; *Doud v. Barnes*, 1 Md. Ch. Decisions.

WRIGHT J. — The cases of *Hollingsworth v. Swickard*, 10 Iowa, 385; *Frost v. Shaw*, Id., 491; and *Powell v. Hunt*, 11 Id., 430, are decisive of the question involved in this; and following them, we are constrained to hold that the court below erred in refusing to dissolve the injunction. Complainant was in no condition to object to the alleged usury in the original contract between his grantor and the respondent. And see further upon this subject, *Stephens v. Minor*, 8 Ind., 352; *Campbell v. Johnston*, 4 Dana, 177.

Reversed.

Ogden v. Ogden.

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1. STEAMBOATS: CONFLICT OF LIENS. The sale of a steamboat under the statute laws of Illinois does not discharge such boats from liens which have attached under the laws of this State. Following *Haight, Bros. & Co. v. The Steamboat Henrietta*, 4 Iowa, 472.
2. SAME: MARITIME LAW. The maritime law, as administered in courts of admiralty, does not apply to this class of cases.
3. SAME: JUDGMENT AGAINST A BOAT: BOND. In an action against a steamboat, a judgment may be rendered against the boat and the sureties upon the bond upon which such boat was discharged from levy. Following *White v. Tidale et al.*, 12 Iowa, 75.

Appeal from Des Moines District Court.

THURSDAY, APRIL 17.

THE facts are stated in the opinion of the court.

Browning for the appellant.*C. Ben Darwin* for the appellee.

LOWE, J.—A special proceeding under the boat act, to recover the value of work done and materials furnished in repairing the steamboat "J. W. Jones."

The work was done in the spring of 1858. In the fall of that year the boat was seized and sold to defendants, to satisfy a claim for which there was a lien under the statute laws of Illinois. In the spring of 1859, before the year expired, while the boat was again navigating the waters of this state, she was taken by the plaintiff for the purpose of making her amenable for \$98.60, being the price and value of the work and materials aforesaid.

The principal error insisted upon by appellants, was in holding that the seizure and sale of said boat to a third party under the statute laws of Illinois, did not have the effect of discharging her from the lien given to the plaintiff under the laws of this state.

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This particular question was quite fully and fairly settled against the appellants, in the case of *Haight & Bro. v. The Steamboat Henrietta*, reported in 4 Iowa, 472 which upon examination is re-affirmed, making it unnecessary for us to restate the grounds of the opinion.

Counsel for appellants mistake in supposing that the maritime laws, as administered in courts of admiralty, apply to cases of this description which are limited to creditors of a particular locality having liens against the boat in question.

Again, it is claimed that in rendering a judgment for the amount of plaintiff's claim against the boat, the court at the same time rendered a judgment against Robert B. Tedford, and John Ogden, upon whose bond the boat had been discharged. This we think was clearly authorized by sec. 2125 of the Code of 1851, and was not error. *White v. Tisdale et al.*, 12 Iowa, 75. Other points are made in argument not suggested by the assignments, nor does it appear from the record that they were even raised in the court below. Judgment

Affirmed.

 DARLINGTON V. EFFEY *et al.*

1. FORECLOSURE: ADMINISTRATOR A PROPER PARTY. In this state the administrator of a deceased mortgagor is a proper, if not a necessary, party to a proceeding to foreclose the same; and in such a proceeding the administrator of the mortgagor (or if it be a deed of trust, the administrator of the grantor) may upon his own motion be made a party.

Appeal from Scott District Court.

FRIDAY, APRIL 18.

BILL to foreclose a trust deed, purporting to be made by Theodore Effey. Service by publication; decree of fore-

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closure without an appearance; execution — the land sold and a deed made to complainant, the purchaser, within the time prescribed by statute, P. C. Effey, claiming to be the heir of Theodore, asked to be made a party, setting up that the trust deed was a forgery, and that Theodore was dead. The heir was made a party, and the default, decree, execution and sale set aside. An answer and cross-bill were then filed, to which there was a replication, setting up, among other things, that said Theodore and P. C. Effey, were, and are aliens, and non-resident foreigners. The appellants presented their letters of administration, and an affidavit of merits, and moved that they be admitted to defend as administrators of the estate of Theodore Effey. This motion was overruled, and they appeal.

John N. Rogers and Dow & Brown for the appellants, contended:

1. The rule is, that an administrator may be made a party. 2. That the contrary rule is unreasonable, and against equity. 3. That the contrary rule is not in accordance with the letter and spirit of the Code of Iowa, citing 3 Powl. Mort., 970, *Daniel v. Skipwith*, 1 Brown's C. C. (marg.), 155, and notes; *Fell v. Brown*, Id., 276; *Christopher v. Sparks*, 2 Jac. & Walker, 229; 2 Hill, Mort., 95, §§ 72-77, notes E and G; Coote, 575; 2 Atkins, 51; 11 Barb., 191; 3 P. Wil., 331; 2 Ball & Beatty (Irish), 565; *Powell v. Spaulding*, 3 G. Greene, 462; *Gammel v. Young*, 3 Iowa, 309; 27 Mo., 547; 6 Cal., 886; 28 Ala., 580; 8 Cal., 580; *Kramer v. Rebman*, 9 Iowa, 114; *Cookey v. Hobart et al.*, 359.

Davison & True for the appellee.

Primarily, the administrator has nothing to do with the real estate, or the proceeds thereof. The heir-at-law is the only party interested. Story's Eq. Pl., § 196; *Slaughter*.

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v. *Foust*, 4 Blackf., 379; *Graham's Executors v. Carter*, 2 H. & Mumf., 6; *David v. Graham*, 2 Harris & G., 94.

WRIGHT J. — By our statute it is declared that deeds of trust of real or personal property may be treated like mortgages, and foreclosed by action in the District Court. (Code 1851, § 2096; 1860, § 3673.) Treating this, then, as a proceeding to foreclose a mortgage, it is proper, upon his motion, to make the administrator of the mortgagor a party respondent.

As a general rule it is well settled by the English practice, as well as that of most of the states, that the heir, in whom is the equity of redemption, is the only proper defendant in a bill of mere foreclosure. (3 Powell, 969; Story's Eq. Pl., § 196; *Slaughter v. Foust*, 4 Blackf., 377.) To this rule there are exceptions. If the mortgagee prays on account of the personal estate, because of the inadequacy of his security, arising from the mortgage, the executor should be a party with the heir. The reason of this is, not because a sale of the land may be decreed, but because in addition thereto, the bill seeks also to appropriate the personal assets, of which the executor is the representative. (3 Powell, *supra*; Story's Pl., § 196.) So it has been held necessary to make him a party where the bill contained an averment that he had been in receipt of the rents and profits of the mortgaged premises, and had paid the interest and part of the debt. Or, where the mortgage was upon a term of years, for then the equity is said to belong to the personal representative. (*Bradshaw v. Outram*, 13 Ves., 235.) Under our statute, it is our opinion that the spirit of the first exception, and not the general rule of the English practice, applies, and that the administrator is a proper, if not a necessary, party in a bill to foreclose.

It is one of the boasts of a court of equity that it delights to do complete justice, and not by halves. So again, it

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always delights, as far as possible, to avoid circuitry of action. Now the old practice was that the heir alone had a right to the equity of redemption; that the proceeding was *in rem*, for a sale of the mortgaged premises alone, and the heir having no right to insist that the administrator should be joined to relieve him by payment out of the personal assets, he was required to bring a new bill against such representative for relief. And this, notwithstanding the mortgage was a debt, to be charged primarily upon the personal assets. In the case however, where a deceased obligor has bound his heirs to the performance of an obligation, the heir and executor both being parties, the court does complete justice by decreeing the latter to perform the covenant, as far as the personal estate will extend, the rest to be made good by the heir from the real assets. And well might Judge STORY say (Eq. Pl., § 175) that, "it is not a little remarkable that courts of equity have refused to act" upon this latter rule, in case of a bill to foreclose. The reason and spirit of equity proceedings, it seems to us, would favor the adoption of the rule. And especially is this so, under a statute like ours, where the mortgagee has a right to a general execution to satisfy any deficiency of his mortgaged debt after exhausting the property mortgaged. (§ 2085.) It is true that in a case like the present there is no general judgment, the mortgagor being dead. But as the assets in the administrator's hands would be liable to pay so much as might be unsatisfied by a sale of the mortgaged property, there is, to our minds, no legal inconsistency in treating this adjudication as conclusive in fixing the amount of the liability of the estate, nor any more impropriety in having the decree contain an order that such balance be made from assets in the hands of the personal representative. Being decisive of the amount, it is his duty to prevent a recovery for a larger sum than was due. Or

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take this case as an illustration. It is pretty conclusively shown that this deed of trust is a forgery; that the supposed grantor was not in this state when the deed purports to have been executed, if, indeed, living for several years prior to its execution; that he was personated by another person who received the consideration. If this deed is foreclosed, the administrator will be bound and compelled to pay any deficiency, after exhausting the property mortgaged, from the assets in his hands. Why, then, is he not a proper party? And particularly so, as it is claimed by appellee that the heir is a "non-resident alien foreigner," and as such has no right to be heard. Upon this subject generally, see *Wilkins v. Same*, 4 Port., 250; 2 Hilliard on Mortg., 95; *Little v. Sinnett*, 7 Iowa, 324.

Reversed.

WILSON & GUSTIN V. JEFFERSON COUNTY.

1. **BRIDGES: LIABILITIES OF COUNTIES.** It is made by the statutes of Iowa the duty of the county in which a bridge is situated to make all repairs requiring an extraordinary expenditure of money; and this duty involves the corresponding liability for damages resulting from a neglect to make the same.
2. **SAME: DISTRICT SUPERVISOR OF ROADS.** While it is the duty of the District Supervisor to make repairs requiring but little labor or expense; he is not liable for damages resulting from defects, the repairs of which would involve extraordinary expenditures.

Appeal from Jefferson District Court.

FRIDAY, APRIL 18.

THE facts are stated in the opinion of the court.

Negus & Culbertson for the appellant, as to the duties of county judges concerning roads, cited the Code of 1851,

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§§ 514, 518, 569; as to the duties of supervisors, Code of 1851, § 582; as to the liability of road districts for damages, Laws of 1858, ch. 48, §§ 16, 17; as to the liability of supervisors, Laws of 1858, chap. 154, § 23, and § 902, Revision of 1860; as to the point that at common law the county would not be liable, *Mower v. Leicester*, 9 Mass., 248.

Rankin & Miller for the appellees.

I. The law imposes upon the county the duty of building, supervising and the general care of bridges. Code of 1851, §§ 514, 517-29.

II. Where the law imposes a duty or obligation it gives a remedy for injuries arising from its non-performance. 2 Chit. BL, 21 (3 Book, marg.), 23. Ang. & A. Corp., 214, chap. 8, § 8.

III. The petition sets out a clear wrong or injury to plaintiffs, and one for which there should be a remedy against some one. There is none against the road district, *White v. Road District*, No. 1, 9 Iowa, 202; there is none against the road supervisor, because he was not notified in writing of the defect in the bridge. Laws of 1858, chap. 154, § 23; there is therefore no corporation or individual liable unless it is the county.

LOWE, J. — In June, 1860, a bridge, constructed by the defendant over a stream called the Big Cedar, on one of the highways in said county, gave way and fell through whilst the plaintiffs' team was passing over the same, damaging said team and the goods in the wagon, as is alleged, \$1,000; to recover which the plaintiffs brought their suit against the County of Jefferson, alleging, in addition to the above, that the under timbers of said bridge were defective and rotten, a fact alleged to have been known to defendant, but not to plaintiffs; nor was such defect visible to the

traveler; nor was the falling of the bridge occasioned by any fault or carelessness of the plaintiffs. A demurrer, raising the question of the liability of the county for such injuries, was overruled, and the same question is renewed before us for settlement.

It is claimed, in support of the demurrer, that at common law the county would not be liable; that there is nothing in the provisions of the statute declaring such liability; but that the remedy, if one exist at all, for such damages, is against the supervisors of road districts, under the circumstances and conditions specified in § 902, Rev. of 1860. When the injured party can bring himself within the terms and purview of that section, there is no doubt but that the supervisor may be made liable for a certain class of injuries. But his liability is personal, for a careless performance, or a continued neglect, after notification, of some duty imposed upon him by law, in consequence of which an injury has resulted. But there are some things in connection with highways and bridges for which he is not responsible. Section 907 of the same act only requires the supervisor of a road district to keep them in as good condition as the funds at his disposal will permit. Usually the power and jurisdiction of a road supervisor is limited to a very few miles of road, and the funds at his disposal correspondingly small. It is not made his duty to build bridges over streams involving a large expenditure of money, or to repair bridges requiring an amount of funds entirely beyond his power to command; as, for instance, where a bridge has been burnt or blown down, or rendered wholly unsafe and impassable from long usage and decay, the repair of which in all such cases would be equal to the original cost of construction.

This class of improvements, because of their general and public importance, are very properly placed under the control, and are to be made at the common expense of

the whole county; yet even the county, by its authorized agents, cannot make such improvements or repairs if the expenditure will require more than \$500, unless the County Judge (and perhaps, now, the County Board of Supervisors) shall first be petitioned by one hundred qualified voters of the county, and give notice, &c. Section 1262, Rev. of 1860. It would be a strange interpretation of the road law to require ten or a dozen men in a small road district to reconstruct a bridge worn out by age, costing a heavy outlay of money and labor, simply because the bridge happened to fall within the limits of that district.

Nevertheless, it is true, that that district and its supervisor may have certain duties to perform in relation to improvements of this kind. The bridge may be strong and substantial, and ordinarily safe for the transit of the traveling public, but a little out of repair — a plank displaced, or something of that description, requiring but little labor or expense to mend or repair the same. All persons comprehend very readily why this duty would devolve upon the supervisor of the district in which the bridge may be situated. But the distinction between such a case and the one made in the plaintiffs' petition in this cause, is clear. We presume the county of Jefferson would not think of insisting, that the supervisor of the road district where this bridge is located should rebuild it himself, or at the expense of the district, for reasons which we have already suggested. If then, he was not bound to repair a defect which involved a reconstruction of the bridge, he cannot be held responsible for damages resulting from the unsafe condition of said bridge.

We have already held that a road district was not a corporation in such a sense that it could be sued. 9 Iowa, 202. If the supervisor is not liable in a case of this description, the question recurs, to whom must the plaintiffs look for indemnity? We think the county. We think so because

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the county is charged with the duty of building and maintaining bridges, and even repairing them, when the requisite expenditure for doing so is large. This duty involves the corresponding obligation or liability to pay damages resulting from a neglect of the same. This rule is not only authorized and sanctioned by the analogies, but by the policy of the law, which requires that the traveling public should have some security for a safe passage over the bridges and highways of the country. 2 Sharswood's Blackstone's Com., 21; Angell and Ames on Corporations, 214.

In England it has been held that the common law casts a *prima facie* liability upon a county to repair bridges within its limits, and that they are compellable by indictment to perform such duty. Moreover, that they are liable to an action at the suit of any one injured in consequence of their being out of repair. Grant on Corporations, 500-1, 283-4, and the various authorities there cited.

The order overruling the demurrer is affirmed, and the cause remanded.

Affirmed.

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BROWN V. BEESETT.

1. **APPEAL.** A cause was tried before a justice on the 8th day of the month, and the original transcript showed that an appeal bond was filed on the 19th day of the same month, while the bond was filed as of the 29th, and an amended transcript shows that the appeal was taken on the 29th. *Held*, that the court did not err in holding that the appeal was not taken in time.
2. **CORRECTION OF ERROR BY EVIDENCE ALIUNDER.** Under § 3928 of the Revision of 1860, the District Court may hear evidence to explain a mistake in the record of a Justice of the Peace.

Brown v. Beesett.

Appeal from Polk District Court.

FRIDAY, APRIL 18.

ACTION OF REPLEVIN. Judgment before the justice for the plaintiff, and the defendant appealed to the District Court. The other facts necessary to an understanding of the points raised, are presented in the opinion of the court.

*McHenry*s for the appellant, relied upon *Moore v. Mauser*, 9 Iowa, 47.

Brown v. Sibley for the appellee, cited *McBrearty v. Dyer*, 6 Iowa, 528; *Smith v. Snodgrass*, 4 G. Greene, 282; *Cooper v. Woodrow and Coffeen*, 3 Iowa, 189.

BALDWIN, C. J.—The defendant appeals from an order of the district court, dismissing an appeal from a justice's court, upon the motion of plaintiff, for the reason that it was not perfected within twenty days after the judgment.

The cause was tried by the justice, and judgment rendered upon the 8th day of June. The original transcript of the justice shows that an appeal bond was filed on the 19th of the same month, but the original bond is marked as filed upon the 29th day of said month. If the original transcript stood before us unexplained, it should govern, and the appeal was taken in time. Affidavits were introduced in the District Court, by the appellants, tending to show the fact that the appeal was taken before the 29th, and by the appellee, tending to show that it was not taken until after the twenty days had expired.

We are satisfied that the entry on the docket of the justice, that the appeal was taken on the 19th, is incorrect. We can readily so conclude from the affidavits of the *McHenry*s. They each swear that it was about the last day for taking an appeal when the bond was filed. Whether these affidavits were considered by the court in determining

the motion, or whether they could be considered as an explanation of the record, does not appear to have been made a question in the District Court.

Outside of the affidavits, we hold that there is sufficient upon the record to justify the conclusion of the court that the appeal was not taken in time. The bond that was first filed is dated the 29th, and the justice in his amended transcript certifies that it was on the 29th, instead of the 19th, that the appeal was taken. The bond is a part of the records of the case as soon as it is filed, and the indorsement thereon can be considered in determining the time the appeal was taken. No appeal is taken until a bond is filed, and the sureties approved. See § 3932, Rev. of 1860. The justice had a right to amend his transcript, and the amendment, unless stricken from the files, should be regarded as the true record.

Section 3928 of the Rev. of 1860, provides that when an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the District Court may correct the mistake, or supply the omission, or direct the justice to do so. Under this provision we hold that the District Court could hear testimony to explain a mistake in the record, for in what manner can such a mistake be made to appear unquestionable, unless by some explanatory evidence? If this view is correct, the court did not err even if it did consider these affidavits.

We therefore conclude that the record as amended, independent of the extraneous evidence, shows that the appeal was not taken in time, and with such evidence it is made unquestionable that the original record was erroneous.

Affirmed.

Gray v. Earl.

GRAY V. EARL *et al.*

1. PLEADINGS AND EVIDENCE IN REPLEVIN. Under the Code of 1851, evidence showing that the title of the plaintiff in an action of replevin, to the property in controversy, was acquired through a fraudulent sale, was inadmissible when no allegation of fraud was set out in the pleadings.
2. SALE OF PERSONAL PROPERTY. After a complete sale of personal property, the rights of the vendee cannot be prejudiced by the acts of the vendor, when committed without the knowledge or consent of such vendee.

Appeal from Wapello District Court.

FRIDAY, APRIL 18.

THE facts are stated in the opinion of the court.

C. C. Nourse and *S. W. Summers* for the appellant.

Under the general allegation that "the plaintiff is entitled to the present possession of the property," he may prove any state of facts which shows a right to the possession; and when the right of plaintiff to the possession is denied by a general denial, the defendant may prove any state of facts which shows that the plaintiff is not entitled to the present possession of the property. *Oaks v. Wyatt*, 10 Ohio, 344.

Constructive delivery is an act expressing the intention of the vendor to surrender the goods sold. *Story Sales*, § 311.

Hendershott & Burton for the appellee.

The question of fraud formed no part of the issue joined, and was not before the jury. 1 Chit. Pl., 221; 1 Greenl. Ev., §§ 34, 35, 80. In replevin, fraud cannot be put in issue by a mere denial of the allegations of a pleading in which it is not set out. The fraud must be specially pleaded. *Walters v. The Washington Insurance Company*, 1 Iowa,

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404; *Hagan v. Burch*, 8 Id., 404; *Hutchinson v. Sangster*, 4 G. Greene, 340; *Bowen & King v. Hall*, 4 Iowa, 430; *Dyson v. Ream*, 9 Id., 51; *Moss v. Riddle & Co.*, 5 Cranch, 351; *Clark v. Partridge*, 2 Barr, 13; *Ely v. Ehle*, 3 Com., 511; *Manfield v. Watson*, 2 Iowa, 111; *Cheuvette v. Mason*, 4 G. Greene, 231; *Brink v. Morton*, 2 Id., 422.

The rights of the vendor could not be prejudiced by the trespasses of the vendee. *Ford v. Williams*, 3 Kern., 577.

BALDWIN, C. J. — Action of replevin. The property in controversy was the undivided two-thirds of sixty-two acres of corn, standing in the field of one Wykoff. The plaintiff claims the title thereto, through one Brokaugh, who, as the tenant of Wykoff, raised the same. Earl justifies his possession of the corn by virtue of a levy of a writ of execution in his favor and against Brokaugh, by his co-defendant, as constable. Judgment for plaintiff, defendant appeals.

The plaintiff does not, in his petition, state the facts constituting his right to the possession of the property, whether by purchase or otherwise. The plaintiff, in his petition, merely alleges that he is entitled to the present possession of said property, and that the defendants wrongfully detain the same. The answer takes issue upon these averments, and sets up defendants' rights thereto, by virtue of the levy. The court, at the request of plaintiff, gave to the jury the following instruction, viz.: "Fraud not having been set up by the defendants in their pleadings, as affecting the purchase of said corn by plaintiff, or otherwise, the jury are not to consider that matter, it forming no part of the issue they are sworn to try." The giving of this instruction is the first and the principal error upon which the counsel of appellant seems to rely for a reversal. The question presented by this instruction, is, whether, under the law as then in force, the defendant, under an issue made by a mere denial as to the right of

possession, could introduce evidence, and claim that the plaintiff had acquired his right to the possession by fraud.

The position of the counsel for appellant is, that under the law in relation to the action of replevin, in force when this suit was instituted, the plaintiff in replevin was not required, and in this case did not state, the manner in which he acquired his right to the possession of the property; or, in other words, there was no allegation of possession by purchase, and that defendant could not set up in his answer that plaintiff acquired his title by fraud, until it was averred that plaintiff had come into the possession of the property by purchase. Under the law as now in force this difficulty appears to be obviated, as in such actions the plaintiff is required to state in his petition the facts constituting his right to the present possession. If by purchase; it must be so stated, and the defendant can raise the issue of fraud, by specially pleading the same. We are, however, inclined to the opinion that under the law regulating the action of replevin, as embodied in the Code of 1851, the plaintiff not being required to set out the facts constituting his right to the possession of the property, that the defendant, before he could attack the plaintiff's right of possession, for the reason that it was obtained through fraud, must cause such fraud to be specially pleaded. Such seems to be the spirit and design of our statute in reference to pleadings. It has been held by this court that the defense relied upon must be pleaded. *Dyson v. Ream*, 9th Iowa, 57. Fraud consists in the intention, and that intention is a fact which must be averred in a plea of fraud. *Moss v. Riddle*, 5 Cranch, 351. Fraud must be distinctly averred in the proceedings. An averment of facts from which the jury may infer fraud, is not sufficient. *Clark v. Partridge*, 2 Barr, 13. The reason of the rule applies as forcibly in replevin as in trespass: it being necessary to prevent surprise, and to enable the

parties to go to trial upon equal terms with respect to evidence, and proof of facts. *Ely v. Ehle*, 3 Com., 511.

The next error assigned, is the giving of the following instruction: "The rights of plaintiff to said corn cannot be affected by the fact, if the jury should so find that Brokaugh, without the knowledge or consent of plaintiff, did take corn from said field, to Agency, or Ottumwa. The court had already instructed the jury, "that an actual sale of the corn, part payment, a delivery or control given to plaintiff, before the levy made on the execution," was necessary before plaintiff's right of possession was complete. If the jury found to be true that these things had been done, the property was rightfully in the possession of plaintiff, and the acts of the vendor without the knowledge of the vendee could not prejudice his rights.

The giving of other instructions by the court on its own motion, and the refusal of those asked by defendants, is assigned as error. The instruction given by the court on its own motion, as we conceive, properly states the law of the case to the jury, and without the evidence, we are not able to say that the court erred in refusing those asked by appellant.

Affirmed.

NEWELL V. SANFORD.

1. **TENANCY AT WILL.** Where a tenant at will erected buildings upon unoccupied lots, after which the notice required by statute to terminate such tenancy was served, but the tenant continued in possession for a series of years, by the sufferance of, and without any interference by, the landlord; it was held that the service of notice did not change the relations of the parties—that the lessee continued a tenant at will.

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Newell v. Sanford.

2. **SAME: RENT.** When a tenancy is without stipulation as to the amount of rent reserved, the landlord may recover a reasonable compensation for the use and occupation of the premises.

Appeal from Polk District Court.

SATURDAY, APRIL 19.

THE facts are fully stated in the opinion of the court.

C. C. Nourse for the appellant.

Curtis Bates for the appellee.

BALDWIN, C. J. — The plaintiff seeks to recover of defendant, for the use and occupation of a certain lot in Des Moines, and the buildings thereon. The allegation in the petition, is that the defendant occupied said premises at the instance and request of said defendant, and by the permission and suffrance of said plaintiff; that defendant promised to pay to said plaintiff, for such use and occupation, as much as the same was worth.

Upon the trial, the plaintiff testified that he had leased the lot to defendant without any agreement as to time and price, and, in pursuance of such agreement, defendant took possession thereof in 1855. One Warner was introduced as a witness for plaintiff, and testified to a conversation, in which defendant told witness that he was having a house built for him on said lot, and that it was bad policy to build a grout house on a leased lot, as he was liable to be turned out at any time. Upon this evidence, after proving the value of the rent of said premises, the plaintiff rested his case.

The defendant introduced a witness who testified that the house on the leased lot was built for defendant, in the fall of 1855, after the contract was made with plaintiff, as above stated. The plaintiff then introduced in evidence a notice served upon defendant, in 1856, requiring him to quit possession of said premises within three months.

The court thereupon instructed the jury, that this notice, when served, terminated the tenancy at will, and if the defendant continued in possession after the time fixed in the notice at which he should leave; that defendant was liable to plaintiff for the use of both the house and lot, and that plaintiff should recover a reasonable rent therefor. The verdict of the jury being in favor of plaintiff, the defendant appeals. The admission of the notice in evidence, and the giving said instruction, is assigned as error.

It will be recollected that the plaintiff alleges, in his petition, that the defendant occupied and used said premises by the sufferance and permission of plaintiff. The object of the introduction of the notice in evidence, was to show that the tenancy at will, under the first lease, was terminated, and a new tenancy created, by which the plaintiff could claim rent, not only for the use of the lot, but the buildings also; notwithstanding the fact that such buildings were placed on the lot by defendant.

We do not think that the service of this notice upon defendant, taken in connection with the facts as stated in plaintiff's petition,—that the defendant remained in possession for several years after the notice was given, by the consent of the plaintiff—changes the relation or liability of defendant from what it was before the notice was served.

The defendant was a tenant at will, under the agreement with plaintiff. See Code, § 1208. When permitted to hold over by the consent of plaintiff, after the service of the notice, he was still a tenant at will. If a tenancy is without stipulation, as to the amount of rent, then the landlord can recover a fair consideration for the use and occupation of said premises. In the case of *Abel v. Radcliffe*, 15 John., 506, it appears to be settled that where a tenant holds over after the expiration of his term, and the lessor receives rent or otherwise recognizes the party as his tenant, and without any new stipulation between the parties, an implication

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arises that there is a tacit consent that the tenant shall hold from year to year, at the former or first rent.

This case is cited and relied upon by the counsel for appellee, as supporting the rule laid down by the court below. In this case (*Abeel v. Radcliffe*) the rent, as first agreed upon, was for the ground alone, afterwards the landlord, (not the tenant, as in this case,) erected buildings on the premises which were used by the tenant. It was therefore held that the general rule, that the tenant holding over should pay only at the rate named in the first lease, would not apply.

The case of *Bradley v. Cool*, 4 Cow., 349, is analogous to the case before us, and in that the rule is fully recognized, that the tenant holding over, without any new terms fixed, there is a tacit consent to the former terms of the lease. This case is authority for the position of appellant, and under the rule therein recognized, the instruction of the court was erroneous.

Reversed.

VENNUM v. BABCOCK *et al.*

1. CANCELING DEFEASANCE: When the maker of a note executed for money borrowed, conveyed to the payee a tract of land by a deed absolute on its face, and received from such payee a bond for a reconveyance, upon the payment of the sum borrowed, of which contract time was made the essence; and at the maturity of the note, it was by agreement of parties delivered to the maker, and the bond was returned to the obligor for the purpose of having both canceled, and with the intent that the title to the land should vest absolutely in such grantee and obligor, it was held, that the parties did not thereafter sustain to each other the relation of mortgagor and mortgagee; and that after canceling the note and bond, the maker of the note had no title to such land.

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2. **SPECIFIC PERFORMANCE.** As a general rule, a party claiming a specific performance of a contract for the sale of real estate, must show his full compliance with all the terms of the contract, and is required to both aver and prove a demand of the deed, and a payment or tender of the money before suit brought.
3. **DEGREE:** A decree ordering the reconveyance of land held under an absolute deed, as security for the payment of a note tainted with usury, should require as a condition precedent to such reconveyance, a payment of the sum actually found to be due to the holder of the note.

Appeal from Fayette District Court.

SATURDAY, APRIL 19.

THE material facts are stated in the opinion of the court.

McClintock for the appellant.

1. The common law doctrine that a deed absolute on its face can be shown to be but a mortgage, is not applicable to our statute. Code, sec. 2217; *McCrea v. Parmort*, 16 Wend., 460 and 476; *Morris v. Nixon*, 1 How., 118. 2. The facts alleged and proved do not show that either of these deeds are mortgages. *Davis v. Stevens*, 3 Iowa, 158; *The State of Iowa, ex rel. The Attorney General, v. Tilghman*, 6 Id., 496; *Thomas v. McCormack*, 9 Dana, 108; 2 Hawks, 428; 4 Ird. Eq., 221; 2 Id., 560; 8 Paige, 243; 18 Wend., 518; 2 Barb. S. C., 28; 2 L. C. in Eq., part 1, 531. 3. The plaintiff must tender and bring into court the amount due. 5 John. Ch., 122; 5 Id., 566; 3 How., 373; 11 Iowa, 31.

No appearance for the appellee.

BALDWIN, C. J.—This cause, as appears from the record, was submitted to the court upon the bill and answer, and the question for our consideration is, whether, independently of the denials in the answer, there is sufficient admitted to justify the court below in rendering a decree for the plaintiff.

It appears that Babcock, the respondent, loaned to

plaintiff a certain sum of money, and as security therefor, the complainant executed to said Babcock, a deed absolute upon its face, for certain real estate. Babcock, however, gave to the complainant a bond, agreeing to reconvey, upon the payment of the money borrowed and interest, time being made the essence of the contract.

The answer of respondent alleges that at the time the note for which said sum so borrowed was given became due, the complainant being unable to pay the same, at his own request and desire, surrendered up said bond to be canceled and destroyed, and that the respondent then and there surrendered said note to said plaintiff, with the full understanding and agreement that both were to be canceled and destroyed, and that the title to said premises was to remain indefeasible in said defendant.

Subsequently to the surrender of this contract, respondent loaned to complainant the further sum of twenty-five dollars, and took his note therefor, and made a new agreement with said complainant to the effect that if complainant would pay to said defendant, at a certain day, the sum thus borrowed, and pay also the sum first loaned, with interest, that respondent would deed to complainant, the premises first sold to defendant. The \$25 note was to be paid in any event, without regard to the fulfillment or non-fulfillment of the other conditions of his agreement. The respondent further alleges in his answer, that said agreement was reduced to writing, and placed in the hands of a third person, and was to be regarded as an offer by respondent to sell, and to be executed if the complainant should comply with the terms thus proposed, and that the said agreement was to be given up if complainant failed to comply with the offer of respondent. The respondent further answers, that the complainant having failed to pay said money, the said agreement was delivered up and canceled.

Upon this bill and answer the court found that the respondent, Babcock, did receive the title to said real estate as security, that the contract was usurious, that Templeton purchased with a knowledge of the complainant's equities; and rendered a decree, that Babcock reconvey the lands described in the petition, and that the deed to Templeton be canceled; and also declared the contract usurious, and rendered judgment accordingly. The respondent had judgment in his favor for the sum of money loaned without interest, and without any order to the effect that such judgment should be paid before the respondent should reconvey.

From the case as made by the bill and answer, this decree was erroneous. Treating the deed and bond to reconvey as a mortgage, or as a security for the money borrowed, the complainant having failed to pay according to the conditions of the bond, and having consented to its being given up and canceled, could no longer claim any right to the mortgaged premises. If the complainant bases his equities upon the second agreement with respondent, does he then show himself entitled to the relief prayed for? He seeks virtually to enforce the specific performance of a contract, and without showing any such compliance on his part, with its conditions, as would entitle him to recover. The averment is that he is ready to pay the amount due; but he fails to tender the money, or bring the same into court, or offer to do so; nor does he attempt to give any excuse therefor. As a general rule, a party claiming the specific performance of the contract must show his full compliance with all the terms of the contract, and is required both to aver and to prove a demand of the deed, and a payment or tender of the money before suit brought. *Collins v. Vandever*, 1 Iowa, 573.

The decree itself is inequitable. It compels the respondent to reconvey, whether the money due him is paid or

Niles v. Sprague.

not. It leaves him to make the debt out of the judgment, without an order that the property be subjected to the lien of said judgment.

Reversed.

NILES *et al.* v. SPRAGUE *et al.*

1. **EVIDENCE OF MARRIAGE.** The sufficiency and weight of evidence tending to show marriage, considered and discussed.
2. **RECORD EVIDENCE OF MARRIAGE.** The laws of Ohio require that a certificate of marriage shall be returned by the officiating minister or officer to the clerk of the county, by whom it should be recorded. *Held*, That an exemplification of the certificate would be admissible in evidence; but that an exemplification of a mere note or *memorandum* on the records of the clerk would not be admissible.
3. **INSTRUCTIONS.** A suggestion by the court below to the jury that the case at bar had been twice tried and that it was important that they should agree, if they could satisfy their minds as to the right of the case between the parties, was not erroneous.
4. **EVIDENCE: JURY.** Where the court instructed the jury that a certain fact must be proved by *competent* evidence to entitle the plaintiff to recover, it was held that as nothing but competent evidence was before the jury, whose province it was to determine its sufficiency or weight, the instruction would not be construed as directing the jury to consider whether or not it was legally fit or suitable to prove such fact.
5. **LEGITIMACY.** A child born in wedlock, though but a short time after marriage, is presumed legitimate, and the issue of a marriage which is voidable merely is legitimate, and cannot be bastardized in a collateral proceeding by showing that the marriage was voidable.
6. **EVIDENCE: ACKNOWLEDGMENT.** Slight evidence of a reputed relationship, accompanied by acknowledgments on the part of the reputed father, is not alone sufficient to establish the heirship of such father to the child.
7. **SAME: DECLARATIONS.** The declarations of a husband and wife are not competent to establish the illegitimacy of a child begotten and born during wedlock; but the declarations of a mother and putative father are admissible for the purpose of showing that they were never lawfully married.

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Appeal from Washington District Court.

TUESDAY, APRIL 22.

ACTION of right, to recover certain real estate in Iowa county. Both parties claim under Linus Niles, deceased. It is admitted that he died without issue, and never was married. The plaintiffs claim that he was the lawful son of Sanford and Mary or Polly Niles—formerly Mary or Polly Furguson; that Sanford, after the birth of Linus, did not live with the said Polly, but with one Susan Spooner, by whom he raised a family—the present plaintiffs; that the father, Sanford, and the mother, Polly, are dead, and plaintiffs are entitled to the estate of the father in the lands of the son, Linus.

Defendants admit that Linus was the son of Polly, but deny that Sanford was his father, or that they were ever married. They say that after the birth of Linus, his mother married Jonathan Sprague, to whom were born the present defendants, who, as heirs-at-law of the said Polly, claim to inherit this land. Two trials by jury, in each a disagreement, verdict for defendants on third trial, and plaintiffs appeal.

Clarke & Davis and Clark & Bro. for the appellants.

Where the child has been conceived before marriage, and born after it, the law presumes him to be legitimate, although the marriage may have taken place but a short time before its birth. 1 Bouv. Inst., 126; *Page v. Dennison*, 1 Grant's Cases (Pa.), 377; *The State v. Herman*, 13 Ired., 502; *Stegall v. Stegall*, 2 Brock., 256; Reeves on Dom. Rel., 270-273; 2 Stark. Ev., 135. Mere probability of non-access by the husband does not repel the presumption of legitimacy, but if evidence places non-access *beyond all reasonable doubt*, such presumption is thereby repelled.

Com. v. Stricker, 1 Brown, appx., 47; *Stegall v. Stegall*, 1 Brock., 256; *Morris v. Davies*, 14 Eng. Com. Law, 584; Id., 645. And the declarations of the parents, that the child is illegitimate, are not sufficient to overcome the presumption of the legitimacy of a child born in wedlock, though born within less than nine months after the marriage. *De-joe v. Johnson*, 12 La., An., 853; *Bowles v. Bingham*, 2 Mumf., 442; 3 Id., 599; *Stegall v. Stegall*, 2 Brock., 256; 2 Stark. Ev., 139; *Cope v. Cope*, 24 Eng. Com. Law, 730; *Page v. Dennison*, 1 Grant's Cases (Pa.), 377. And after the lapse of thirty years, and the death of the parents and child, its legitimacy will be presumed on slight proof. *Johnson v. Johnson*, 1 Dessausure, 595; 1 Bouv. Inst., 129.

The court held that the admissions of the parents, that they had been married, and that Linus was their son, supported by the common reputation of these facts in the family of both, and the admissions of said Linus himself, was slight evidence of the legitimacy of the said Linus, and this, too, after a lapse of fifty years. Now in cases of this kind, the fact of marriage may be proved in any one of four ways: 1. By record evidence; 2. The conduct and acknowledgment of the parties; 3. The testimony of one present at the ceremony; 4. By common reputation. 1 Bouv. Inst., 112; *Jackson v. Clau*, 18 Johns., 345; 3 Phil. on Ev., 597 (ed., 1859); *Doe v. Fleming*, 4 Bing., 264; 13 Eng. Com. Law, 497; 2 Phil. on Ev. (Ed. 1859, 3 vol.) 279; 1 Id., 631; Id., 251; *Fenton v. Reed*, 4 Johns., 51.

And the declarations of the parents, in favor of the legitimacy of the child, and the general reputation of the family, are evidence of his legitimacy, especially after the lapse of thirty years, and after the parents and child are dead. 1 Phil. on Ev. (ed., 1859), 248-253; 1 Bouv. Inst., 130; *Doe v. Griffin*, 15 East, 149; *Patterson v. Gaines*, 6 How., 550.

Templin & Fairall for the appellees, filed an elaborate argument upon the evidence.

WRIGHT, J. — Linus Niles was born in 1811. Sanford Niles married Susan Spooner some two years afterwards, and about the same time Polly married Jonathan Sprague. Linus died in October, 1853; Sanford, in November, 1848; Polly, in February, 1852. It is admitted that Sanford always recognized plaintiffs as his children, and that this recognition was general and notorious.

It will be observed that the material inquiry in this case is, whether Linus was the son of Sanford; and connected with this, and important to its determination, the further question whether Sanford and the mother, Polly, were ever married. And here we reverse the usual order in determining cases, by taking up, first, the motion for a new trial, so far as it applies to the verdict of the jury upon these facts.

The case was tried three times. There is a great amount of testimony on either side, bearing upon the question of parentage. It is all before us. We have carefully examined it, and do not believe the jury erred in their conclusion. If the verdict had been otherwise, we would not have been justified in interfering. The case, upon this matter of fact, is not free from difficulty; but the weight of all the facts and circumstances we think preponderates in favor of defendants' position. The plaintiffs affirm. The burden of proof is upon them. If in this they fail, or if the testimony does not preponderate either way, defendants are entitled to a verdict. Aside from the conflicting evidence which relates to the fact of marriage, or that which bears upon the paternity of Linus, there are some undisputed facts which tend strongly to support this finding. The parents of these parties all lived in the same neighborhood in 1811, and for some years afterward. Linus was born some few months (three or four) after the alleged marriage between Sanford Niles and his mother. Within a year or

two after this, the father married Susan Spooner, and the mother married Sprague, each having knowledge of the other's marriage. And yet there is no evidence, nor is it pretended, that any objection was made to these unions. The parents of each were then living, and interposed no objection. The relations thus formed continued uninterruptedly for near forty years, and until they were determined by death. Some children were born to each, who associated with each other as neighbors and friends. To admit, under such circumstances, that a valid, legal marriage ever took place between the father of plaintiffs and the mother of defendants, would assume a state of society exceedingly demoralized, and a disregard of the marriage relation on the part of the parents and the parties to it, seldom if ever known in a christian community. And if we connect with this the further facts, admitted by plaintiffs, that Sanford never lived with this wife after the birth of the child, and that, at the time of the alleged marriage, as shown by plaintiffs' testimony, he protested, repeatedly and earnestly, that the child to be born was not his, we have facts that weigh heavily against admissions and circumstances to which witnesses testify some forty-five years after their occurrence. If the case turned, therefore, upon these questions of fact, we should not feel justified in disturbing the verdict. These facts were submitted to the jury under instructions, and if these were correct, this case must be affirmed.

Before examining these, however, we will consider whether the court erred in excluding a certificate of marriage offered by plaintiffs. This point is not urged with any confidence by appellants, and it needs no more than a passing notice. An exemplification of a copy of a record is not sufficient under the act of Congress relating to this subject. If the marriage was solemnized, then, under the laws of Ohio, where the marriage took place, it is required that a certificate

of the fact shall be returned by the officiating minister or officer, to the clerk of the county, which is to be recorded. The law requires an exemplification of this certificate, and not an exemplification of the note or memorandum made by the clerk in his records, which in this case seems to have been general, and without attempting to set out the return of the officiating officer. In the rejection of this testimony, we do not think the court erred.

The court, after passing upon the instructions asked by the parties, told the jury that the case had been twice tried, and that it was important that they should agree, if they could satisfy their minds as to the right of the case between the parties. To this suggestion plaintiffs excepted, and now assign the same for error. To this action or remark we can see no just ground of objection. If improper, it was as much so to defendants as to plaintiffs. But it was so to neither. It was not only the right, but the duty of the court, to remind the jury of the protracted litigation, and of the necessity on their part to labor honestly and faithfully to arrive at a verdict, and thus terminate a controversy which time only tended to make more expensive and embittered. There was no intimation as to how they should decide, but a general remark that they ought to agree, if they could satisfy their minds, as to the right of the unpleasant controversy. And this same thought would have occurred reasonably and properly to any intelligent person, without this suggestion from the court.

The fifteen instructions asked by plaintiffs were given, as well as most of those asked by defendants. These present the law applicable to the facts of the case as claimed by the respective parties, very fully and clearly. Some of those asked by defendants are assigned for error, and these we proceed to notice.

Instruction number three was as follows: "The plaintiffs, in order to inherit the property in controversy, must not

only prove by competent evidence that Sanford Niles and Mary or Polly Ferguson were lawfully married, but must show to the satisfaction of the jury, that Linus Niles was the legitimate son of the said Sanford Niles and Mary or Polly Ferguson, and also that there is no other descendant that impedes the descent; and that unless the evidence in this case shows these three facts, to the satisfaction of the jury, they will find for the defendants." Two objections are urged: 1st, that it requires the jury to determine that the marriage was *lawful*; and 2d, to determine what is *competent* evidence of that fact. It seems to us that the appellants put an improper construction upon the language of the instruction. All of the testimony submitted to the jury was, for the purposes of the trial, competent. They had nothing to do with any other, nor was it any part of their duty to question its competency. It was for them to determine its weight or credibility—what facts were or were not established. The word *competent*, as here used, therefore, we understand to mean *sufficient* or *adequate*, and not that the jury were to determine whether the testimony was legally fit or suitable, or otherwise, to prove the necessary fact or facts.

As to the other point there is more doubt. This instruction, however, is to be taken in connection with all the others. The law is that the child is presumed to be legitimate, though born but a short time after marriage. If born during wedlock, the law presumes legitimacy. If the marriage is voidable, merely, it remains valid until annulled by proper proceedings. The issue of such a marriage are legitimate, and they cannot be bastardized in a collateral proceeding of this character, by showing that the marriage was voidable. And under the law of Ohio, in force at the time of the alleged marriage of these parties, though the marriage was null and void, the issue was not illegitimate. The law, as thus briefly stated, was very fully

and clearly given and explained to the jury in the instructions asked by plaintiff. There is nothing indicating that the marriage (if any) was null. No single fact occurs to us now, upon which such a claim could be based. The parties were each at the time fully competent to enter into the relation with each other. If they were married it was voidable, and this is the most that could by possibility be claimed under the testimony. This being true, the jury could not have misunderstood the law as given to them in the several instructions on this subject, at the request of plaintiffs. The vital issue, however, was, whether there had ever been a marriage in fact. If not, then the child Linus was not legitimate, and his mother, and not the father, would inherit his property. Taken in connection with the other instructions and the above facts, therefore, the words *lawfully married*, in the instruction now under consideration, must be understood as referring to the question whether there ever was a marriage in fact. From the testimony we gather, further, that defendants probably insisted that what plaintiffs claimed as a legal or lawful marriage, was a mere sham, practised upon the parties by third persons, either for their own amusement or to annoy and harass the indignant groom,—that, in a word, it was a counterfeit and not a genuine marriage. We do not say that the testimony sustains this view, but refer to the fact to show the probable purpose of this instruction. If this was all that took place, then there was no lawful marriage, and the legitimacy of the child would not be established.

Another instruction objected to, is this: "Slight evidence of a reputed relationship between Sanford Niles and said Linus, although the same may be accompanied with acknowledgments that said Linus was his son, are not sufficient to establish the heirship of plaintiffs without further deductions of pedigree; and if the jury are satisfied that the evidence shows nothing further than such reputed

relationship and acknowledgments, they will find for defendants." Given and qualified by the court, as follows: "If the jury are satisfied, after a careful examination of all the evidence before them, that Sanford Niles and Polly Ferguson were married; and that said Linus was born of said Polly after such marriage, and has been recognized and treated by them as their child; this would be very strong and convincing evidence that he was the legitimate son of said Sanford."

The connection between the "*qualification*," and the instruction as asked, is not readily perceived. And yet, as we view them, neither are erroneous. There is certainly no improper rule affirmed. The only chance for error is by inferring that they mean more or something different from what is stated. We do not understand the instruction to say that there was only "*slight evidence*" of the reputed relationship, but that *such* evidence, (if there was no more,) although accompanied, &c., would not be sufficient to establish the heirship of plaintiff. Nor would it. For if there was no marriage between the father and mother, plaintiffs could not inherit, whatever the evidence of relationship, and paternal acknowledgments. True, the presumption is in favor of the legitimacy of the child. True, also, that the marriage might be shown by cohabitation, the conduct and acknowledgment of the parties, common reputation, the testimony of those present at the ceremony, as well as by the record. But these are matters not touched by the instruction. The modification certainly is good law, — for if all the facts should concur, therein supposed, there would remain but little doubt of the legitimacy of the offspring. If the parties were married, Linus was born during wedlock, *and they recognized him as their child*, we should truly have convincing evidence that Linus was the son of Sanford. But this does not assert that such recognition was *necessary* to prove his legitimacy. If it

did, the qualification would most clearly be erroneous. The proposition is that if two things occurred, which of themselves are *prima facie* evidence of the principal fact to be established, and another corroborative fact occurred, then the case made would be quite strong and convincing. And no one will for a moment question the correctness of such a proposition.

The next and last instruction complained of, is this: "The declaration of Sanford Niles and Mary or Polly Ferguson, are competent to establish the legitimacy or illegitimacy of Linus Niles, and such proof is competent to bastardize said Linus so far as the same tends to show that the said Sanford and Polly were never lawfully married; and if the jury believe from the evidence and the declarations of the said Sanford and Polly that they were never lawfully married, they will find for defendants."

If this instruction is to be understood as asserting the broad doctrine, that such declarations are competent to bastardize the issue, then upon authority we should regard it erroneous. Such evidence is held incompetent upon grounds of public policy (11 East., 132; 5 A. & E., 180), or, as Lord MANSFIELD says (Cowp., 594), "it is a rule, founded in decency, morality and policy, that the husband and wife shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious." He is here speaking, however, of post-nuptial intercourse, and the rule has more particular application to those cases where, the marriage being undisputed, it is proposed by such declarations to establish the non-access of the husband. In the case before us, the capital fact to be established, is the marriage. The declarations of the mother and putative father, introduced in evidence, had reference to or bear upon that fact. And having reference to this testimony, and looking to the whole of the instruction, while it might possibly be mis-

understood, yet we think the fair construction is that such declarations may be received "so far as they tend to show that they were never lawfully married."

As thus understood, we think it was correct. It must be remembered that the testimony tends almost conclusively to show that Sanford and Polly never lived together, never recognized each other as husband and wife. The case is not one, therefore, where parties have lived together for years, treating each other as husband and wife, and where afterwards it is sought to bastardize their issue, by proving their declarations that they were never lawfully married. This child was begotten before, but born after, the alleged marriage. The question to be determined is one of inheritance. If there was a marriage, as claimed by plaintiffs, then the presumption is that Sanford was the father of Linus. But it is a presumption which is not conclusive, and which it is entirely competent to rebut. To obtain a predicate upon which to base this presumption, it was essential to establish the marriage. And we can see no reason, as bearing upon the pivotal point, why the declarations of the mother and putative father, made about and after the birth of the child, are not receivable, even if the effect should be to show the illegitimacy. And as applied to this case, this view finds much to sustain it from the consideration, that if Sanford and Polly were married, then they both violated every law of "decency, morality and policy," when they afterwards entered into the same relation, the one with Susan Spooner, and the other with Jonathan Sprague. And under such circumstances will such laws be more violated by receiving declarations which recognize the validity of these subsequent marriages, or those which convict them of a gross disregard of the proprieties of enlightened, christian society, an entire indifference to the condition of the several children born to them during the admitted wedlock of each, and an utter contempt for the

Sibley v. Van Horn.

laws of the land? Such a question cannot be difficult to determine. The judgment is

Affirmed.—

SIBLEY V. VAN HORN.

1. GUARANTORS: STATUTE CONSTRUED. Section 954, of the Code of 1851, was not repealed or changed by the provisions of "An Act relating to evidence," which took effect February 9th, 1854.

Appeal from Polk District Court.

SATURDAY, APRIL 22.

ACTION on a promissory note. The material facts are stated in the opinion of the court.

McHenry for the appellant.

S. Sibley, pro se.

LOWE, J. — The plaintiff brought his suit upon a note indorsed in blank by the defendant, who was not a payee or assignee, without making a demand of the maker and giving reasonable notice of the non-payment to the defendant, who was sought to be made liable as a guarantor.

The cause was tried by the court, who found from the evidence, certain facts from which it was held that the defendant had received no detriment for the want of notice, agreeably to the provisions of § 954 of the Code of 1851, and therefore judgment was rendered in favor of plaintiff for the amount of the note. The defendant claims that this decision was unauthorized either by the evidence or the law of the case. First, it is insisted that the evidence shows that the defendant did receive a detriment from the

Le Claire v. The City of Davenport.

want of such notice, but the reply to this is that the court found otherwise, and this finding we think is justified by the evidence reported. Secondly, it is claimed that the section of the Code just referred to does not contain the law applicable to this case, but that the same has been repealed or modified by a statute passed Feb. 9, 1853, to the effect that "notice of non acceptance or non-payment, or both, of said instruments, shall be required, according to the rules and principles of commercial law." Whilst this act does undoubtedly change and modify some of the provisions of Chapter 58 of the Code of 1851, on the subject of bills and notes, it does not affect § 954, which is but declaratory of the law merchant on the subject of guaranty. Story on Prom. Notes, §§ 460-485; Bayley on Bills, pp. 286-289; Edwards on Bills and Prom. Notes, 241-2-3-4; *Marvin v. Adamsom et al.*, 11 Iowa, 371; *Sabin & Moon v. Harris*, 12 Iowa, 87. Judgment below is

Affirmed.

LE CLAIRE V. THE CITY OF DAVENPORT.

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1. PUBLIC MARKET. The Council of the City of Davenport has power to authorize an individual to erect a building upon private property, and to lease or rent the rooms or stalls therein for a market; to declare such building a public market-place, and to dictate the mode and manner of conducting the markets therein; to exact rates of rent that shall not operate as a restraint upon the trade of the city; and to protect the owner in the exclusive privilege of such market; overruling *The City of Davenport v. Stolley*, 7 Iowa, 102.
2. SAME; RULE OF CONSTRUCTION. The courts will not construe an ordinance making such a grant as void upon the grounds of public policy unless such construction is clearly deducible from its language.

Le Claire v. The City of Davenport

Appeal from Scott District Court.

TUESDAY, APRIL 22.

THE petition in this case alleges that on the 18th of October, 1854, the council of the city of Davenport passed an ordinance granting to plaintiff, for a consideration named, and for the convenience and benefit of said city, the right to erect and put in operation a Market House, on a certain parcel of real estate therein described; that by said ordinance plaintiff was given the right to rent, lease and hire the stalls, rooms, &c., in said building, to be used for the purpose of selling meats, vegetables, &c., as is customary in market places; that the city further covenanted to protect plaintiff in the exclusive privilege of said market, that no other market houses, (except as therein stated,) should be established in said city; and that such ordinances should be passed as would protect plaintiff from competition. It is also averred that the city undertook to regulate the hours of marketing, dictate the mode and manner of conducting the same, appoint proper officers to preserve order, to see that the ordinances in relation to markets were complied with; would authorize plaintiff to rent his stalls, &c., conformably thereto, and would compel a compliance with all such ordinances in relation to markets and market houses, — the privilege to continue for ten years.

Petitioner shows a compliance with the terms of said ordinance on his part, the erection of the house, at a cost of \$10,000, and his readiness to comply with any ordinance the city might pass in relation to markets; but he charges that the city has totally neglected to pass the necessary ordinances to make his privilege exclusive, and protect him from competition, whereby he has been deprived of the benefits which would otherwise have arisen from the rents and profits of said market house, to his damage, &c.

A demurrer to this petition was sustained, upon the ground that the city had no power to pass the ordinance, or enter into the contract relied upon by plaintiff.

Grant & Smith for the appellant.

James T. Lane, city attorney, for the appellee.

WRIGHT, J. — The ruling in the court below was based alone upon the case of *The City of Davenport v. Stelley*, 7 Iowa, 102. That was decided by a divided court, the majority holding that the city could not delegate to individuals the right to erect market houses and charge rent for the use of the stalls therein, reserving to itself no power to control the same; that the fact that the city gave the lessee absolute control over the rents of the building rendered the same a private, as contradistinguished from a public market, and that the defendant, who was charged with selling fresh meats at a place other than said market place could not be made liable for a violation of this void ordinance. The minority opinion, on the contrary, holds that it was competent for the city to authorize an individual to erect such house, which might be adopted and declared by the proper authorities to be a public market; that the object of the ordinance was to regulate the markets and trade; that this was competent, and that, in no event, could the ordinance be objected to, as operating to restrain trade until the rates fixed by the lessee for the rent of the stalls and rooms were so exorbitant as to have that effect.

Our conclusion is, that the minority opinion contains the better exposition of the ordinance, and that the city could confer the power therein specified. We are not prepared, by any means, to hold that the lessee has the power under this ordinance to fix the rents to be charged for the use of the stalls therein by the occupants, without any control on the part of the city authorities. On the contrary, if said

lessee should establish or exact such rates as to operate as a restraint upon the trade of the city, then it is in the power of the city to interpose, and pass the necessary ordinance for the protection of the public. By the ordinance, the right conferred is "for the convenience and benefit of the city." The city is to "regulate the hours of marketing," "dictate the mode and manner of conducting the same," "see that the ordinances in relation to markets are complied with;" and is compelled to "authorize the lessee to rent the stalls, rooms and conveniences of his building conformably thereto."

But aside from this view, it seems to us that the possibility that the lessees might exact such prices for the use of the stalls as to restrain trade, ought not to invalidate the ordinance. Any ordinance, contract or law, will be so construed, if possible, or consistent with legal rules, as to give it force and effect. It will not be presumed that any one has or will violate his obligation, or a law, state or municipal. Nor that he will so conduct his affairs as to conflict with those rules which experience has demonstrated are essential for the public welfare. Nor again will a court be justified in concluding that the parties have made an agreement which is void upon the grounds of public policy, unless such a construction is clearly and fully deducible from the language of the instrument. If a construction can be found which will uphold and carry it out, this should be adopted, and the parties thus given the full benefit of their contract. And as in this case, we are not prepared to adopt the conclusion that the city has, by the ordinance in question, clearly surrendered all control over the rents to be charged; nor the further one that the lessees could adopt such rates as to restrain trade, and thus injuriously affect the public interest, we believe it our duty to declare it valid.

Tidrick and Norris v. Rice.

It is the duty of the city, by the ordinance, to declare this house a public market, and to pass such ordinances as shall give it this character, and also to protect the lessee in its use—he receiving the revenue to be derived therefrom—subject to such ordinances as may, from time to time, be adopted. The revenue cannot be taken from him, but the rent to be charged for the use of the stalls, &c., as well as the general management of the market, is subject to the control of the city.

Entertaining these views, we conclude that the demurrer was improperly sustained.

Reversed.

TIDRICK AND NORRIS V. RICE.¹

1. **AGENCY: POWER TO BIND THE PRINCIPAL.** The authority of an agent of a banking house to discount notes and take security does not include the power to receive for the principal a conveyance of real estate, and to bind such principal by a bond for a reconveyance by a deed containing a covenant of general warranty. The power of such an agent, in the absence of special instructions, is governed by the uniform rule or custom of the house.
2. **SAME: CUSTOM.** When a banking house which was in the habit of discounting notes and taking conveyances of real estate as securities (executing back bonds for reconveyance), used printed forms in executing such bonds, which forms contained a covenant of special warranty, it was held that such form should have been regarded by an agent in the nature of special instructions, or a rule of the house for the transaction of that class of business.
3. **SAME: NOTICE.** A party taking from an agent a bond containing a covenant of general warranty, must at his own peril, ascertain the nature and extent of the agent's authority.

¹ This opinion determines two cases consolidated by agreement of parties—one a chancery cause entitled *Tidrick and Norris v. Rice*, and the other an action at law arising out of the same subject matter, entitled *Basley v. Tidrick and Norris*.

Tidrick and Norris v. Rice.

4. **SAME: RATIFICATION.** The conduct of a principal will not be construed as a ratification of a bond executed by an agent, when it does not appear that at the time he had knowledge of the existence of the bond.

Appeal from Polk District Court.

TUESDAY, APRIL 22.

THE facts are fully stated in the opinion of the court.

Byron Rice, pro se.

1. A court of equity does not decree a specific performance as a matter of course, even of a valid contract, and it will never execute a hard or unconscionable bargain, or one tainted with fraud. 3 Barb., 50; Story Eq., 333.

2. Where an agent contracts to sell property in a manner not authorized by his principal, the contract will not be enforced; neither will the specific performance of a contract which involves a breach of trust be decreed. 2 L. C. Eq., 52, and the cases there cited.

3. A court of equity will refuse to decree a specific performance on the ground of hardship, even when there is no other objection. Story Eq., 331; *Terwilliger v. Matthews*, 3 Barb., 50, and the numerous cases there referred to; 2 Vea., 307; 1 Sug. Vend., 24, § 36.

4. The contract which complainants seek to enforce is not supported by a sufficient consideration, and should not be enforced, for that reason. Story Eq., 787, 793; 4 Paige, 305; 2 Blackf., 431.

5. The defendant cannot convey a good title to the property in controversy, and for that reason will not be decreed to specifically to perform. Story Eq., § 716, and note; 1 Mad., 295.

C. C. Nourse for the appellee.

1. The acts of an agent, or one whom a man puts in his place to transact all his business of a particular kind or at a particular place, will bind his principal so long as he keeps within the general scope of his authority, though he may act contrary to his general instructions. 2 Kent, 621; *Johnson v. Jones*, 4 Barb. S. C. R., 370.

2. In the absence of instructions, the agent was governed by the usages of the business. Dunlap's Paley's Ag., 4; *Owings v. Hull*, 9 Pet., 608; *Leroy v. Beard*, 8 How., 451; 1 Pet., 25.

3. If an agent has authority to sell, he may warrant against express instructions, and the principal will be bound. *Hunter v. Jamison*, 6 Iredell, 253; *Benjamin v. Eyzell*, 1 Tenn. (Sneed), 497.

4. Defendant's conduct amounts to a ratification of the agency. An adoption of the agency in one part, with a knowledge of all the circumstances, operates as an adoption of the whole act. Dunlap's Paley's Agency, 172, note i.

LOWE, J.—These suits, by agreement, were consolidated. The facts giving rise to them may be stated as follows:

On the 18th day of June, 1856, one Franklin Palmer sold to Tidrick and Norris a tract of land, containing 15 $\frac{3}{4}$ acres, designated as lot 3, in sec. 5, T. 75, N. of R. 24 W., as surveyed and platted by John McClain, county surveyor, for a consideration, part of which was paid down, the balance in two deferred payments, one of \$800, at 6 months, the other of \$600, at 10 months, for which sums notes were given, drawing 10 per cent interest from date. On receiving these notes from Tidrick and Norris, Palmer executed and delivered to them a title bond, binding himself to convey to them, by deed of general warranty, the property in question, when the notes specified should be paid.

In September following, before the first note fell due, Palmer offered them for discount at the counter of the

banking house of Green, Weare & Rice, at Des Moines. The latter, Mr. Rice, being the only resident partner, was the active and managing member of the firm. At this particular period of time, however, he was absent in the east, having left the business of the house in charge of three clerks, the chief and controlling one of whom was a Mr. Taylor, who had with him Messrs. Pollock and Okell, occupying more subordinate positions as clerks.

The business of this banking establishment included that of a real estate agency, and also the agency of investing and loaning the money of outside parties to the best advantage, upon adequate security. Anterior to this time, a Mr. James S. Easley, of Virginia, had placed the sum of \$4,000 with this house, to be thus loaned or invested for his benefit.

Mr. Taylor, after due inquiry, informed Mr. Palmer that he was willing to accommodate him in the matter of the application for a discount of the notes in question, on the condition that he would execute a deed of conveyance with a covenant of general warranty for the land sold to Tidrick and Norris at once and directly to Byron Rice, who would make his title bond to the said Tidrick and Norris for the same land, whereupon the bond from Palmer to these parties should be given up for cancellation, provided Tidrick and Norris would accept Rice's in lieu thereof. They consented to do so, and the arrangement was entered into, as proposed. The negotiation, however, was entered into by the banking house as his agent for the benefit of James S. Easley, whose money was used in purchasing the notes aforesaid. These notes, when received by Taylor, representing the bank, were indorsed in blank, and filed with the papers of Easley, as securities belonging to him; and also certain entries were made at the time in the books of the establishment, showing that the transaction had been effected for the benefit, and on the account, of the said Easley. Mr. Taylor, however, instead of execut-

ing a title bond to Tidrick and Norris in the name of Easley, the principal, and the party chiefly interested, or in the name of the firm constituting the banking house, who in their capacity alone as a firm, were the agents of Easley, gave what was intended to be a bond for title in the individual name of Rice, alone. Great stress is attempted to be imparted to this fact by the defendant, Rice, both in his pleadings and his argument.

But the conclusion to which we have been brought in the case by the evidence, from the best analysis which we could give to the same, makes it unnecessary for us now to determine to how much importance this circumstance is entitled. Pursuing the facts in the chronological order, in which the testimony shows them to have occurred, we proceed to say that Mr. Taylor, in executing the alleged bond from Rice to the plaintiffs in the chancery suit, made it to correspond substantially in its terms with the blank form of a printed bond which had been adopted and used by that house, without exception, so far as the evidence shows, in all similar cases; that is to say, a bond which stipulated to re-convey by a deed with a special warranty.

When such a bond was presented to Mr. Tidrick, he protested that it was unlike the bond they held from Palmer, and insisted that it should contain a covenant for a general warranty deed. This demand was readily complied with by Taylor, who gave a new bond, that Mr. Rice should convey the land by a general warranty deed, on condition the notes specified should be punctually paid at maturity. This being satisfactory, the transaction was closed. The \$800 note falling due about the 20th of December, thereafter, was paid by Tidrick and Norris, and received by the banking house of Green, Weare & Rice, without objection by either party. When the \$600 note fell due, in April, 1857, Tidrick and Norris made a legal tender for the full amount thereof at the banking house of

Green, Weare & Rice, and offered to pay the same, on condition that Rice would make to them a general warranty deed for the property in question, according to the covenant of his bond. This was refused by Rice, first because Taylor, as the clerk and employee of the firm of Green, Weare & Rice, had no power or authority to bind said firm, or an individual member of said firm, in any such covenant, even in a transaction where they were the principals and directly interested, much less in a transaction of this description, where they themselves were the agents, doing business for a third party; second, because the title of this property had been placed in him without his consent or knowledge, and whilst he was absent from home, that he had no interest in nor had he received any benefit from the same, and that it would be inequitable, under such circumstances, to place him in a position where he would be subjected to the liability of making good, for all time to come, Palmer's title to said property.

In this attitude of the parties to each other, Tidrick and Norris commenced their suit in chancery, on the bond, for specific performance, and, shortly after, Easley instituted a collection suit on the note against them. Both of these suits resulted in favor of Tidrick and Norris. The facts set up in the petition for a specific performance, constitute substantially the defense in the collection suit, hence the agreement to consolidate. It is in this consolidated form or condition of the record that the whole case is now before us, and the first noticeable feature presented by this record is the somewhat remarkable fact that before either suit was brought, each party defendant offered to do what it is now sought to compel them to do by the institution of said suits, with the exception that Rice proposed to make the required deed with a covenant of special instead of a general warranty of title. This latter requisite was insisted upon by Tidrick and Norris, on the one hand, whilst upon the other

the obligation to do so was stoutly denied by Rice. The whole controversy, therefore, is narrowed down to that single question, the determination of which depends upon two facts. First, whether Taylor, the cashier and book-keeper of the banking house of Green, Weare & Rice, in representing the agency of the bank in discounting paper with the money of a third party, and taking real estate security for the debt thus created, had the authority to take the title in Rice's name, and bind him to reconvey with covenants for a general warranty deed. If not, then, secondly, whether he afterwards adopted and ratified the exercise of such authority.

Upon these two points a large amount of testimony has been taken, upon which we can give no space in detailed comment, but shall simply state, in very general terms, our conclusions upon the same.

On the first point, direct or express authority is not pretended, but that it existed by implication, from the nature of the duties which Mr. Taylor, as the employee of the defendant, Rice, and his associates, was required to perform, that the power to discount and take security included the exercise of such authority. This by no means follows. In the absence of special instructions on the subject, it would depend upon the rule or custom which the house had uniformly adopted for itself.

In negotiations, made on its own account, where security was taken in the method spoken of, the house, it seems, had established a rule, from which there is no evidence that it had ever departed, and that was to give a bond to reconvey, with a covenant of special warranty.

Printed forms of bonds of this description were in the banking house at the time of this transaction, and should have been regarded in the nature of special instructions to Mr. Taylor, in the premises. Indeed, he seems to have so considered it himself, for the first bond which he drew and

tendered to Tidrick and Norris corresponded with the blank forms, but upon the suggestion, by Mr. Tidrick, that the bond should be in its terms like the one they held from Palmer, it was accordingly so modified. But it was no less the duty than the business of Tidrick and Norris to have ascertained the extent of Taylor's powers in making such a bond. By so doing, they would have learned, in all probability, that Taylor was specially restricted to the conditions of the bond which he first presented. If this is true in reference to negotiations made for and on account of the banking house itself, when the benefit is to result to it, *a fortiori*, it should be in a transaction made as agents by the house for the benefit of a third party. In such a case, the habits of dealing were not such as to authorize any bond whatever to be given by the agents, but in the natural course and custom of business, it should in this case have been given in the name of Easley, the party directly interested, and on whose account the negotiation was entered into.

But the chief reliance of the bond-holders in this case, in the argument of their counsel, is, that the acts of Taylor in the premises were subsequently ratified by Rice. If so, it is equal to an original delegation of authority to bind the principal. But we are not able so to interpret the evidence. At the time certain acts were done by Rice, after his return from the East, which are relied upon as amounting to a ratification, it does not appear in the evidence that he was advised that any bond whatever had been given in his name, more especially with the objectionable covenant in question, but that, on the other hand, when the existence of the bond, with its particular covenants and terms, was made known to him, he very promptly repudiated it as an unauthorized act by Taylor. This is very clearly our understanding of the evidence, when considered as a whole. The conclusion, therefore, to which we come, is, that Rice is under no obligation to execute the kind of deed

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stipulated for, in the paper executed by Taylor; that Tidrick and Norris have no right equitably to insist upon it, under the circumstances; that under a special warranty deed from Rice, they will be in as good a position as if they had taken a general warranty deed from Palmer, under his bond, for the reason that in law they have the benefit of such a covenant in the deed from Palmer to Rice, and therefore have all the rights and protection they would have had under their contract with Palmer. Nevertheless, we are not prepared to hold that Tidrick and Norris should be compelled to accept from Rice a special warranty deed, for they had made no such contract with Rice or his agent, and we cannot consent to make a different contract for them.

Under the peculiar circumstances of this case, we see no alternative but to reverse the decree below and dismiss the plaintiff's bill, unless they will elect to accept from Rice a special warranty deed for the property in question; in which event, such consent being signified in a reasonable time, the same decree made below, in all respects, will be entered in this court, with the exception of the modification suggested. In the event that Tidrick and Norris do not elect to accept a special warranty deed from Rice, then the case at law, to wit: *Easley v. Tidrick and Norris*, which, by the agreement of the parties, had been consolidated with this suit, after it had been dismissed by the order of the court, is ordered to be reinstated in accordance with the stipulations of the parties, and the two causes, thus consolidated, will be remanded, to be again tried, agreeably to the principles and matters settled by this decision.

 Bates v. Kemp.

BATES V. KEMP.

1. **PRACTION ON DEMURRER.** A demurrer to an answer setting up three distinct causes of defense was sustained in the court below, which ruling was reversed by the Supreme Court as to the first cause, and was not passed upon as to the remaining defenses. It was held:

1. That the cause was remanded for trial only on the first cause, and that as to the others the defendant had no standing in court.

2. That on a second appeal, the Supreme Court would consider the sufficiency of the demurrer as to the defenses undetermined on the first appeal.

2. **PROMISSORY NOTE: DEFENSE.** Where two notes were executed for the purchase money of real estate, and the payee and vendee executed his bond to the maker conditioned for the conveyance of such real estate upon the payment of the note last maturing, it was held, that the failure or inability of such vendor to make the conveyance at the maturity of such second note did not constitute a good defense to an action on the note first maturing, by a third party holding it indorsed after maturity but before such defense existed.

3. **CASE EXPLAINED.** *Shipman v. Robbins*, 10 Iowa, 208, explained and affirmed.

Appeal from Polk District Court.

TUESDAY, APRIL 22.

THIS cause was before this court at the June term, 1861, and reversed on the ground that the court below erred in sustaining plaintiff's demurrer to the first clause of defendant's answer. See 12 Iowa, 99. A *procedendo* accordingly issued, and, at the August term of the District Court, 1861, plaintiff replied to this clause. The case was tried before the judge, without the intervention of a jury,—judgment for plaintiff, and defendant again appeals.

Casady & Polk for the appellant.

I. We maintain that the court erred in holding that the Supreme Court only reversed the ruling of the District

Court on plaintiff's demurrer to defendant's third amended answer as to the first count, and sustained it as to the other two clauses. *Bates v. Kemp*, 12 Iowa, 99. The demurrer was a general demurrer to the whole answer, and was not confined to any part of the same. This court has repeatedly held, that a general demurrer to the whole declaration or answer must be overruled whenever either of the counts therein is good. *Chambers v. Lathrop*, Mor., 102; *Coon v. Jones*, 10 Iowa, 131; *Jones v. Worick*, Id., 29.

II. We have already seen that the second and third counts of the answer stood at the trial unobjected to by demurrer or otherwise. Now, unless the allegations therein contained, are wholly immaterial, defendant should have been permitted to prove them on the trial. The court cannot disregard them if they tend to set up a defense, even though they be defective, both in form and substance. *Mackey et al. v. Mettler*, 1 Iowa, 528; *Frentress v. Mobley*, 10 Id., 450.

III. It is well settled that the payment of the last note, and the conveyance of the real estate for which it was given, are dependent covenants, and no suit can be brought to recover the purchase money, unless plaintiff shows a performance, or offer to perform on his part. *School District No. 2 v. Rogers*, 8 Iowa, 316.

IV. It is equally well settled that, although the first note (where several have been given in payment for real estate,) is independent of the covenant to convey until the last note becomes due; (when, as in this case, the conveyance is to be made,) it then becomes dependent on such covenant, and no suit can be brought on the first note, until a conveyance is made or tendered. *Cunningham v. Grier*, 4 Blackf., 341; *Cox et al. v. Hazard*, 7 Id., 409; *Coe v. Smith*, 1 Ind., 271; *Cavenor v. Fennimore*, 8 Ind., 135.

V. Again, the assignee having taken the note after due, took it subject to all the equities between the parties. Story

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Prom. N., § 178; *Shipman v. Robbins*, 10 Iowa, 208; *Hunt v. Livermore*, 5 Pick., 395.

Curtis Bates, pro se. It is not contended that Lyon conveyed the land, which formed the consideration of this note before the note was indorsed to plaintiff. Lyon could not after the indorsement, by any act or omission destroy the rights of the indorsee. Story Prom. N., § 178; *Campbell v. Rusch*, 9 Iowa, 337; *Shipman v. Robbins*, 10 Iowa, 208; Bayley on Bills, 130, note p; 5 Wend., 20; *Woods and Hobart v. Morgan et al.*, Morris, 179, 375; Sug. Ven., 181; *Brandt v. Foster et al.*, 5 Iowa, 287; 1 Pars. Cont., 216, note j. Equities available as a defense must be prior to the transfer, 8 Cow., 505; *Baker v. Wheaton*, 5 Mass., 509; *Watson v. Bourne*, 10 Id., 337; *American Bank v. Jenness*, 2 Met., 288; 1 Scam., 583; 6 Shep., 179; 1 McMullen, 258; 10 Conn., 80; 20 John., 144.

WRIGHT J.—It is first objected that, upon the issue joined, under the testimony, the finding should have been for defendant. We are very clear, however, that the finding was right. Defendant admitted the execution of the note, and set up that he had been released. Upon him was the burden of proof. So far from sustaining it, the weight of the testimony is in plaintiff's favor.

The note in suit was made to Jonathan Lyon, or order, of date October 1, 1856, due in one year. Defendant, for further defense, sets up—1. That Lyon by his bond agreed to convey to defendant certain real estate, on the payment of this note and another for the same amount, due October 1, 1858, given for the purchase money; that both notes were due at the time of the institution of this suit, and that no deed had been tendered. 2. After setting out the consideration as above, avers that Lyon conveyed said real estate to one Turner, and that it is out of his power to convey the same to defendant, according to the terms of

his bond, and that the note was assigned to plaintiff after maturity. A demurrer to both these pleas was sustained. When the cause was before us in June, 1861, the sufficiency of these defenses was not passed upon. When it was remanded, defendant claimed the right to introduce testimony to sustain these parts of his answer, to which plaintiff objected. The objection was sustained, and this ruling is now assigned for error.

The District Court had previously sustained the demurrer to the whole answer, and defendant did not amend. This court did not interfere with that ruling, except as to the first clause. When the cause was remanded, therefore, defendant had no standing in the court below, except upon his first defense. As to the other two pleas, he was out of court.

He claims, however, that the demurrer was improperly sustained as to these pleas, and asks their examination. We think this is his right, and therefore pass upon their sufficiency.

A reference to a few facts, and the application of the principles of law governing, will be sufficient to show that the demurrer was properly sustained. It is not shown that the second note was due at the time of the assignment of the first one to plaintiff. Neither does it appear that, at the time of the execution of the bond, or the transfer of this note to plaintiff, Lyon did not have a good title to the property. It does appear, however, that Lyon had no title at the time the deed was to be made by the terms of the bond. Now this note, maturing as it did before the conveyance was to be made, was independent of the covenant to convey. And if it be admitted that it was in Lyon's hands at the time of the maturing of the bond, it would be treated as dependent, in the same manner as the last note, this rule could not operate to defeat plaintiff's action. At the time he obtained the note there was no defense to it. The

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payee at that time could have maintained an action upon it, and the holder by indorsement was clothed with the same right. And being thus clothed—there being at that time no equities in favor of the defendant—those subsequently arising could not avail him against the present holder. It is true the note was overdue at the time of the negotiation, and plaintiff took it as a dishonored instrument, subject to any defenses *then* existing against it; but not subject to those that might subsequently arise. (*Campbell v. Rusch*, 9 Iowa, 337; *Shipman v. Robbins*, 10 Id., 208.)

In the last case, this language is used: "Set-off is not like payment, or a defense going to the want or failure of the consideration, or fraud in obtaining the note. These attach to the note itself, or the transaction out of which it arose, and control, qualify, or extinguish the plaintiff's right to recover, and therefore are available against an indorsee taking it after maturity." Without some qualification or explanation, this language might be deemed in conflict with the ruling now made, and therefore we refer to it. Properly understood, there is no conflict. A set-off is an equity, (not a defense,) between the parties to the paper arising out of other independent transactions. And therefore, when not governed by some statutory rule, it cannot avail the party taking the note by indorsement, though existing at the time of the negotiation. Fraud or a want of consideration attach to the note at its inception, and of course are available against the party taking it after maturity. A failure of consideration, while it in one sense attaches to the note itself, its availability depends upon the time of its occurrence. In the case of fraud, the payee could not maintain his action at the time of the transfer. So in case of a want of a consideration. In the case of a failure of consideration, he may or may not do so. If he could then his indorsee can, for he ought not to be affected by what may subsequently occur.

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In this case, if the indorsee had, at the time of his purchase, gone to the defendant and made inquiry as to the validity of the note, he would have learned that at that time these defenses did not exist. It was his duty to do this, and he is presumed to have done so. He had made his two notes, one of which (that in suit) matured before he was entitled to a deed. If, subsequent to the transfer of the first note, (the transfer being after maturity,) his vendor places it out of his power to make a deed, the indorsee should not be the sufferer.

The cases of *Turners v. Gilchrist*, 1 Sandf. Sup. C., 53, and *Hedges v. Healy*, 9 Barb., 214, are in principle like the one before us. In the first case the note was transferred before due, but the *consideration* was such that the indorsee took it subject to all the equities between the maker and the payee. In the second, the note was payable to "order" — was not indorsed, but transferred by delivery only,— and it was held that the holder was not a *bona fide* indorsee, and that the note was open to any equitable defense which the maker had against it *at the time of the transfer*. In the first case it is said that the indorsee took it subject to the equities *then* existing, but not subsequent ones. These cases differ from this, only in the fact that here the note was indorsed after maturity. But in each the indorsee stands only in the place of the payee, at the time of the transfer. He is entitled to no greater protection, nor should he be subject to any greater burdens.

Affirmed.

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13	229
101	736
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129	79
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1. **JUROR: INTEREST: CHALLENGE.** In the formation of a jury the challenges should alternate between the parties, the plaintiff having the first challenge. Revision of 1860, § 3036.
2. **SAME: INTEREST.** Where in an action against a city a juror stated that he was a taxpayer and resident of the city, but that he had no opinion as to the case which would prevent his rendering a verdict according to the law and the evidence, it was held that the court did not err in sustaining a challenge for cause. Revision of 1860, § 3039.
3. **PLEADING OVER.** A further answer upon which issue was joined and trial had, which presented the same defense set out in the counts of the original answer, to which a demurrer was sustained, operates as a waiver of any error in the ruling of the court sustaining the demurrer.
4. **CONSTITUTION: CONSTRUCTION: MUNICIPAL INDEBTEDNESS.** Article 11, § 3, of the Constitution of 1857, does not affect the validity of contracts entered into by municipal corporations before that instrument took effect.
5. **NUISANCE: DEFENSE.** A municipal corporation can not appropriate to its own use gas furnished by a company, and avoid payment therefor on the ground that the works at which it is manufactured are a nuisance, when such works have never been, in the proper manner, declared a nuisance.
6. **CONTRACT.** The inability of a municipal corporation to pay an indebtedness incurred under a contract made by competent authority, cannot defeat an action thereon; neither can the corporation annul such a contract by notifying the other party that it cannot and will not pay the indebtedness which will be incurred by its execution.
7. **EVIDENCE: BILLS.** In an action by a gas light company against a municipal corporation for the value of gas furnished under a contract for two months named, it was held, that the bills for gas furnished during the months immediately preceding under the same contract, approved by the council of the corporation, were admissible for the purpose of showing, *first*, the number of lamps lighted, and *second*, that the city recognized the validity of the contract under which it was furnished, and its liability to pay for the same.
8. **BILL OF EXCEPTIONS.** A general exception to the giving of each of "the instructions embraced in the charge of the court" when the charge involves several propositions of law, any one of which is not erroneous, presents no question for review on appeal. The same rule applies to a general exception by one party to the giving of instructions asked by the other; but when instructions are asked and refused, and such refusal is noted on the margin of each instruction, a general exception presents a

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question for review upon each instruction so refused. *Eyser v. Weisgerber*, 2 Iowa, 463; cited and explained.

9. CONTRACT: PUBLIC POSTS. The phrase "public posts" in a contract for the lighting of a city with gas, includes posts erected and used for the benefit of the public, and is not restricted to those owned by the city.

Appeal from Scott District Court.

MONDAY, JUNE 2.

THIS action was brought on the 22d September, 1858, upon a special contract to recover for gas furnished one hundred and eighty-six lamp posts in the streets of the city during the months of July and August of that year. The contract was dated, August 6, 1857; and by its terms plaintiffs were to supply the public lamp posts, erected and to be erected, for a specified sum per month, for the whole unexpired term of the charter. The amount claimed was \$1,278.95, the recovery \$986; and from the judgment defendant appeals.

James T. Lane and *James Grant*, for the appellant, cited *Eyser v. Weissgerber*, 2 Iowa, 481; 8 Kent, 563; *Irwin v. Dixon*, 10 How., 34; *The State v. Carver*, 5 Strob., 217; *Brown v. Graham*, 24 Ill., 628; *Boyle v. Levings*, 24 Ill., 223; *Peoria v. Hughes*, Id., 231.

Charles E. Putnam and *John N. Rogers* for the appellee, cited: 1. As to the waiver of error by pleading over, *Duncan v. Hobart et al.*, 8 Iowa, 337; *Taylor v. Galland*, 3 G. Greene, 17; *Gillis v. Matthews*, 4 Id., 254; *Ford v. Jefferson County*, 4 Id., 273; *Angus v. Campbell*, 8 Iowa, 582; *Plummer v. Rhoads*, 4 Id., 587. 2. As to the ruling of the court upon the challenge for cause, *Wood v. Stoddard*, 2 John., 194; *Russell v. Hamilton*, 2 Scam., 56; *Peck v. The Freeholders of Essex*, 1 Zab., 656; *Eberle v. The Board of St. Louis*, 11 Mo., 427; *The Mayor, &c., v. Goetchuoa*, 7 Geo.,

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139; *The State v. Williams*, 30 Mo., 184; *Hawks v. The Inhabitants of Kennebeck*, 7 Mass., 461; *Tatum v. Young*, 1 Port. (Ala.), 298; *The State v. Arther*, 2 Dev., 217; *The United States v. Cornell*, 2 Mason, 91. 3. As to the sufficiency of a general exception to the instruction of the court. *Oliver v. Phelps*, 1 Zab., 597; *Haggart v. Morgan*, 1 Seld., 422; *Jones v. Osgood*, 2 Id., 233; *Hunt v. Maybee*, 3 Id., 266; *Hunt v. The Rensselaer and Saratoga Railroad Company*, 4 Id., 37; *Caldwell v. Murphy*, 1 Kern., 416; *Decker v. Matthews*, 2 Id., 313. 4. As to the construction of the words "public posts." *Beekman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 45; *Bloodgood v. The M. & H. R. R. Co.*, 18 Wend., 9; *Buffalo and New York Railroad Company v. Brainard*, 5 Seld., 100; *City of Cincinnati v. White's Lessees*, 6 Pet., 431; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407.

WRIGHT, J.—Appellant assigns thirteen distinct grounds of error, for the reversal of this judgment. So far as they are insisted upon in argument, we proceed to notice them.

I. A juror stated, "that he was a taxpayer in the city, lived in the sixth ward, did not believe it was right for the inhabitants of that ward to pay their share of the taxes, and get no gas, but had no opinion as to this cause which would disqualify him from rendering a verdict according to the law and evidences." On this statement, plaintiff challenged for cause, and the challenge was sustained. Under clause 2, § 3039 of the Revision, if the court, in the exercise of a sound discretion, is brought to the conclusion that the juror will not act with entire impartiality, the challenge should be sustained. There was no abuse of this discretion in this case, and the ruling is therefore affirmed. The court might well conclude that the juror would not act with entire impartiality, and hence that there was actual bias.

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II. In the formation of the trial jury, defendant insisted that plaintiffs should first exhaust all their peremptory challenges. The court, however, required the parties to alternate, the plaintiff first and defendant afterwards, until both had completed their challenges. This was correct, certainly, under the Code of 1851, § 1774, in force when this action was commenced. The corresponding section in the Rev. (3036,) changes the phraseology somewhat, but we think the meaning is the same. The words "in term," would be entirely superfluous, under any other construction.

III. Certain pleas of the defendant were demurred to, the demurrer sustained, and this is the next matter challenging our attention. These pleas are numbered 2, 3, 4, 5, 7, 9, 10 and 11. Some of these were in the nature of denials of plaintiff's petition, or parts thereof, and so far as there was any error in holding them defective, defendant waived the same by his "further answer" afterwards filed, which covers the same ground, — upon which there was an issue and trial. This remark applies to the third and fourth pleas certainly. Whether it does to others, we need not determine, as we are clear that as to them the demurrer was properly sustained. And we prefer to take this view of the case, from the fact that questions are raised which it is important should be settled, for the guidance of the parties in future.

The second plea sets up that on the 5th September, 1857, the time of the adoption of the present Constitution, the city was indebted to an amount in the aggregate exceeding five per centum on the state and county valuation of the previous year; that no public lamp posts were then erected, and that it was not competent for the city after that date to become further indebted for any purpose; and that said plaintiffs, for gas furnished thereafter, could not recover.

The language of the Constitution (Art xi, § 3) is: "No county or other political or municipal corporation shall be

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allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property, within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness." We are to inquire, first, whether this prohibition is applicable to the contract now under consideration. We think most clearly not. It was made on the 6th of August, 1857, and the Constitution was not in force until in September. The contract created the liability. It was by this, and at its date, that the indebtedness was incurred, within the meaning of the Constitution, and the subsequent prohibition could not interfere with the rights or obligations of the parties to it. It is as if the city had contracted for the erection of a market house, a public hall, for the building of a bridge, culvert, or the like, agreeing to pay a certain sum when the work should be completed. If the contract was made prior and the work done subsequent to the 5th September, 1857, the Constitution could not change or affect the same.

The seventh plea is, that the Gas works, where plaintiffs manufacture the gas furnished and sued for, were, at the time referred to in the petition, and continue to be, a nuisance; that the city under its charter has authority to prohibit but not to legalize a nuisance, and that a contract made for gas furnished at such a place is not binding.

If the Gas works referred to constituted a nuisance, then it was the right and duty of the city to so declare. But until this is done, and the fact found, we are not aware of any rule which would permit the city to appropriate to its own use the gas furnished, receive the benefit thereof, and then refuse to pay for it upon the ground that the place where the same was manufactured, was a nuisance. No individual consumer could certainly set up such a defense, nor can the city.

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The eleventh plea is, that by the acts incorporating said city, the corporation is not authorized to levy a tax of over five mills on the dollar in any one year, unless the question of levying the same is first submitted to the legal voters; that prior to the 1st of July, 1858, all the taxes levied for that year had been appropriated; and that there was no mode by which a specific tax could be raised for lighting the streets, except by petition to do so; that no such petition had been presented; that plaintiffs were notified of these facts prior to the 1st of July, 1858; after which time the city was not liable.

We cannot see why the city should be released from its liability to fulfill this agreement, because it could not pay in the year 1858. Not only so, but if five mills on the dollar would not pay this with other debts, (if this amount was levied, even, which is not averred,) then the question of raising more could have been submitted to the legal voters, as pointed out in this plea. Nor could the fact that the property holders to be benefited had failed to petition for the levy of a specific tax, release the city. If there is no property of the city from which the debt can be made, then the question of the authority of the city council to raise the means to liquidate this debt by taxation or otherwise, might and would become material. But if the contract was binding upon the city, and this is not denied, so far as the authority to execute it is concerned, then the ability to finally pay the indebtedness incurred and arising thereunder, cannot defeat this action.

Appellant's counsel do not insist upon the pleas numbered 5, 9 and 10, and we need not, therefore, notice them.

IV. On the trial, plaintiffs offered in evidence certain bills for gas for the months of December, 1857, January, February, March, April, May and June, 1858, the same having been presented to and allowed by the city council, and paid. These bills were for gas furnished lamps or

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posts in the streets of the city, being the same posts for the lighting of which in July and August this suit is brought. This evidence was objected to. 1. Because such payment does not imply a liability to pay a future bill, and especially where the gas was furnished after notice of refusal to pay as admitted by plaintiff. 2. Because it is not competent to thus prove that the lamps thus lighted were on public posts.

We have no hesitation in saying that this testimony was most clearly admissible. Whether it was competent to thus prove the matters referred to in the second objection we do not now discuss, as that will more properly come under review, when we come to consider the instructions. But to show the number of posts lighted, (and this was a question of fact controverted by the parties,) and that the city had recognized its liability to pay the debt now sued on, the testimony was very pertinent. It is not true, as stated, that such payment does not imply a liability to pay a future bill. If one party has undertaken to do a particular thing from month to month, and as often as required performs the contract, the opposite party has from such acts good right to presume that as long as he performs on his part, the party undertaking will continue to comply. Thus if A agrees to furnish B one horse each month for one year, and B pays for the same from time to time as the bills are presented, A. has certainly a right to presume, (aside from the binding effect of the contract,) when he delivers another horse, that the bill will be in like manner paid. But it is said there was notice that the bills would not be paid, and as this is much relied upon by defendant, we here notice it.

It seems to us that the entire meaning and effect of this notice is misapprehended. If the lamps lighted were upon public posts, then the city could not repudiate this contract upon the assumption that no tax could be levied to pay

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the liability thereby incurred, without being petitioned therefor by the owners of more than half the property so to be taxed. And this is all there is of this notice. The resolutions passed by the city council, of which the Gas Company had notice, were of date June 11, 1858, as follows: "*First*. That from and after the first day of next July, the city will pay for no more gas until property-owners petition therefor, under the provisions of the charter. *Second*. That notice be and is hereby given to the Davenport Gas Light and Coke Company; that from and after the 30th of June, instant, we shall not use gas in the public lamps; and that the superintendent, or whoever has the matter in charge, be directed from and after that date to see that no gas lamps are lighted, as the same will not be done by order or consent of the city." But such resolves could not revoke the contract made with the Gas Company any more than they could compel the furnishing of gas in a manner and for prices different from those fixed by its terms. If there was a liability to pay these bills, the liability continued, notwithstanding this action of the city council, and notice thereof to the company. Not only so, but as applied to the admission of these bills, the rule applies, that individuals are held to "a careful adherence to truth in their dealings with each other," and one party cannot by his "representations or silence involve another in onerous engagements, and then defeat the calculations and claims his own conduct has superinduced." (23 How., 381.)

V. We next come to the examinations of the instructions given and refused, of which appellants complain. In doing so, we shall not undertake to quote and give our views upon each, but shall state generally the law, as applicable to the case. Before doing this, a matter somewhat preliminary, merits attention.

From the bill of exceptions, it appears that, of the fifteen instructions asked by defendant, eleven "were refused, to

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which defendant excepted." The charge of the court covers ten pages, and at the conclusion thereof it is stated "to the giving of each of which instructions the defendant excepted."

It is now insisted that under the Revision of 1860, this method of excepting presents no question for our review, if any one of the instructions asked were properly refused, and, as applied to the charge of the court, if any part of it was correct. Our construction of the statute (§§ 3051 to 3061,) is, that appellant's position is correct as to the "charge" of the court, but not as to the instructions refused. These are in distinct paragraphs, and marked in the margin "refused." They each enunciate some rule or rules of law, which defendant claims were applicable, and should have been given. If any one was improperly refused, therefore, there was a ruling upon the law or proposition as there stated, and as that particular proposition was called to the attention of the court, and insisted upon by the party asking it as the law governing the case, there is no chance for surprise, nor any fair ground for claiming that the mind of the judge was not called to what it was that counsel would have him hold. Not only so, but the statute on this subject seems to recognize a distinction between instructions asked and refused, and the "charge" of the court. For, speaking of the latter, it declares that "every part or paragraph shall be deemed approved, unless excepted to before the retiring of the jury; if so excepted to, that fact and by whom excepted to, whether by plaintiff or defendant, shall be stated by the court on the margin, against such instruction, or part of the charge." As to the former, however, there is no such requirement. The necessity for this rule is well stated in *Jones v. Osgood*, 2 Seld., 233. "The rules on this subject," says JOHNSON, J., "are tending rather to increased strictness, and not at all to relaxation. They have their foundation in a just regard

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to the fair administration of justice, which requires that when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences; and does not permit the party to lie by without making his objection, and take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails to succeed, avail himself of an objection, which, if it had been stated, might have been removed." And the rule here held applicable to the "charge" of the court, applies to instructions asked and given, to which the other party objects. A general exception, if any instruction is good, will present no question for review in this court.

It is proper to state that the case of *Eyser v. Weissgerber*, 2 Iowa, 463, was decided under the old law, and followed what we regarded the then settled practice of the state. The Revision, in our opinion, however, has given the rule, a rule which accords with our views of justice and propriety, and as the question has been made now for the first time, and argued by able counsel, we have deemed it proper to settle it at once, though the conclusion arrived at after carefully examining the instructions, does not render its determination, in all its bearings and forms, strictly necessary.

As the appellant claims that there was error in refusing his instructions, we may properly examine them. And, in considering them, it is proper to premise, that the issue of fact mainly controverted, and to which most of the instructions have reference, was whether the posts, for the lighting of the lamps on which this suit is brought, were public, in such a sense as to render the city liable. It is claimed that they did not belong to the city, were not city property, that the city did not erect them, that they had not been dedicated to the public, for that there had been only a casual use for less than a year, and that the city

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never had, by any order, ordinance or resolution, declared them public lamp posts. It was claimed by the plaintiffs, on the other hand, that to bring these lamps within the contract, it was not necessary that the ownership should be in the city, that though not owned by the city or public, they would still be "public lamps," if they were erected for the use and benefit of the public, as contradistinguished from private individuals, and were in fact so used, and that this was especially true, if they were erected under an agreement with the city, (or public,) were under its supervision, and have been recognized and treated as of this character.

The claim or view taken by plaintiffs was substantially sustained by the court, and, as a consequence, defendant's instructions were refused, and we think very properly. Were these posts "public" within the meaning of the contract, was the fact to be determined. To make them such, so far as to enable the plaintiffs to recover in this action, it was not necessary that they should belong to the city, any more than a building used for a public purpose, but rented from an individual, for the lighting of which by gas the city was sought to be made liable. If they were intended and understood by both parties to be "public," and were accepted and recognized as such by the city council, it was sufficient to entitle the plaintiffs to recover, though they might not, according to a technical, abstract definition, come within the meaning of "public lamp posts."

The notice of the 11th of June can legitimately have but little bearing upon this question, for the order to discontinue is not placed upon the ground that the posts are not "public," nor is such a thing pretended nor intimated. On the contrary, in the very resolutions providing for the notice, they are styled and recognized as "public posts."

VI. Without referring to the testimony in detail, we state that the verdict was clearly warranted, and that there

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was, therefore, no error in overruling the motion for a new trial, and in arrest of judgment. Notwithstanding the confidence with which this point appears to be urged by counsel, we do not see how the jury could have determined otherwise, under the evidence submitted. So far from its being a case where the evidence was strongly against the verdict, or manifestly against it, as some of the cases express it, or a case where injustice has been done, the weight of the evidence decidedly preponderates in favor of the finding, and we cannot disturb it.

Affirmed.

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13	240
81	548
13	240
104	369

1. JUDGMENT LIEN. Under the Code of 1851 the lien of a judgment attached to whatever interest the defendant had in real estate, whether such interest appeared of record or not.
2. SAME: LIMITATION: SCIRE FACIAS: REVIVOR. Under the Code of 1851 the lien of a judgment continued in force for ten years, but the right to enforce it by execution existed for but five years, unless revived by *scire facias*.
3. SAME: REVIVOR OF LIEN: SCIRE FACIAS. Where two judgments were recovered, one in 1847 and one in 1848, which subsequently attached under the Code of 1851, as liens upon equitable interests in certain real estate, which judgments remaining unsatisfied in 1854, a new judgment was recovered on them as in an action of debt, for an amount equal to both judgments and costs up to that date, it was held, that the judgments of 1847 and 1848 were merged in the judgment of 1854, and that the liens of the same upon the real estate of the defendant were thereby discharged; and that a sheriff's sale of the premises under the last judgment, made in 1858, conveyed the interest of the defendant, subject to any other liens thereon or rights therein acquired prior to the rendering of such judgment.
4. JUDGMENT IN SCIRE FACIAS. In *scire facias* no new judgment should be entered; but the court should order that the plaintiff have execution on the judgment described in the writ and for costs.

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5. **LIEN: REVIVOR.** While a judgment may be revived there is no revivor of the lien of a judgment on real estate. The revivor of a judgment by *scire facias* creates no new lien.

Appeal from Clinton District Court.

MONDAY, JUNE 2.

THE facts are stated in the opinion of the court.

Grant and Smith for the appellant, contended that a revivor of the judgment also operated as a revivor of the lien. 2 Bour. Law Dict., "Revive;" "Scire Facias;" 1 Tenn., 388; 7 Verm., 54; *Dickerson v. Allison*, 10 Georgia, 537; 3 Bac. Abr., Execution, H; *Clippinger v. Miller*, 1 Pen. & W., 61; *Trevor v. Ellenberger*, 2 Id., 94; *Penn v. Hamilton*, 2 Watts, 53; *Ebright v. The Bank*, 1 Id., 399; 3 Bac. Abr., 407; *Knight v. Nutt*, 1 T. R., 209; *Phillips v. Brown*, 6 Id., 282; *Dixon v. Heslop*, Id., 365; *Dougherty's Estate*, 9 Watts & S., 189.

Baker and Bailey for the appellee, contended:

1. Upon *scire facias* the order should be that plaintiff have execution. 1 Tidd's Pr., 1047; 3 Bur., 1790; 6 Iowa, 89; 2. That the liens of the old judgments were extinguished by the new judgment. 18 Wend., 621; 7 Cow., 540; 1 Ed. Ch., 609; 2 Id., 165; 6 Paige, 88; 7 Barb., 341; 3 Id., 819; *Hart's Appeal*, 8 Penn., 185; 1 Id., 101; 2 Id., 490; 3 Binn., 443; 7 Penn., 65; 2 Gratt., 44; *Wood v. Maine*, 1 G. Greene, 275; *Harrington v. Sharp*, 1 G. Greene, 131.

BALDWIN, C. J.—The plaintiff recovered two several judgments in the District Court of Clinton County, against the Hauns and one Samuel Peck—one bearing date September 14, 1847; the other, May 8, 1848. In 1854, these judgments remaining unsatisfied, the plaintiff filed his petition, for the purpose, as it is now claimed, of reviving the right to an execution in each of said causes. Upon this petition, the 19th of September, 1854, a judgment as upon

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an action of debt, was entered up for the full amount of both the former judgments, with interests and costs up to that date.

On this last judgment, on the 4th of December, 1853, an execution issued, and the interest of the Hauns' in the real estate in controversy was sold, and purchased by the plaintiff, and deeds executed by the sheriff, in pursuance of the terms of the sale.

On the 10th day of February, 1849, the said Hauns made a contract with the school fund commissioner of said county, by which they purchased the lands sold by said sheriff of said commissioner, paying a portion of the purchase money down, and receiving a bond showing that they were entitled to a deed for the lands thus purchased, when the purchase money was all paid. This bond or contract was assigned to one Townsend Cox, the assignment bearing date October 31st, 1853.

Cox, by his attorney, John P. Cook, assigned this contract on the 25th day of June, 1855, to John B. Turner, and Turner obtained a patent for the lands thus sold, from the State of Iowa, on the 9th day of September, 1855. It appears from the agreed statement of facts, that the assignment by the Hauns to Cox, was in security of a debt due from them to Greenway Brothers & Co., of which firm Cox was a member; that Turner was an agent of the Galena & Chicago Union Railroad Company; that he holds the said lands in trust for said company; that W. G. Haun agreed with John Clark, as the agent of said Railroad company, to sell said land for about \$27.00 per acre; that Clarke and Haun went to Davenport, where Cook and Dillon held said assigned contract for Cox, and the money was paid as follows: to Cook and Dillon, as agents of Cox, about \$5,000, to the school fund commissioner about \$———, and to Haun \$300 to 400, and the contract assigned to Turner, as above stated.

The plaintiff by his present proceeding seeks to quiet in time the title to said lands purchased at said sheriff's sale. The respondent, Turner, claims that the said lands were not subject to the lien of plaintiff's judgment, and that no title passed by virtue of the sheriff's deeds. The court below dismissed the complainant's bill for want of equity, and from this order he appeals.

The interest the Hauns acquired by virtue of their purchase from the school fund commissioner, was an equitable one, and, under the law in force when these judgments were obtained, no judgments of the District Court were liens upon the equitable interest of the defendants, unless such interest appeared of record. Under the provisions of the Code of 1851, judgments were liens upon all the real estate owned by the defendant, whether it appeared of record or otherwise. Under the provisions of this law, we suppose the lien of plaintiff attached to whatever interest the Hauns had when this law took effect. From the view we take of the case, we deem it unimportant to determine the point so closely contested by the opposing counsel, as to whether it appears from the pleadings and the admitted statement of the parties that the equity of the Hauns did appear of record or otherwise. Under the provisions of the Code of 1851, § 2489, the lien of a judgment continues in force for the term of ten years only from its rendition. The lien therefore created by the judgments of 1847 and 1848 had expired before the sale by the sheriff, in 1858, unless the lien was continued by virtue of the proceedings in 1854. While the lien of a judgment continues ten years from the date of its rendition, yet, the right to enforce such judgment by execution, exists for but five years, unless such right is revived by *scire facias*. When the plaintiff commenced his proceedings in 1854, the liens of his judgments still existed, but he was without a remedy to enforce them five years having then elapsed after the rendition

of the judgments. In order to enable him to enforce his judgments, he either had to revive the writ, or bring his action of debt upon the judgments. And an important inquiry here arises as to which remedy he resorted to.

The plaintiff alleged, in his petition, after reciting the judgments, that they were unsatisfied; that they had run for more than five years; that he was without remedy to enforce the said judgments; that upon account of the lapse of time, and for no other reason, was he barred from having his executions. He therefore prayed, that the court would render judgment, reviving the former judgments, with interest and costs. In the notice served, the defendants are required to appear and show cause why the plaintiff should not have judgment for the amount of the former judgments, with interest and costs. No reference is made to a prayer for a revivor of the writs of execution.

The judgment is an ordinary judgment, as upon debt. No reference is made to the former judgments, no order made that the writs issue to enforce said judgments, but the amount of the two judgments, with interest and costs, are added together, and a new judgment entered for this sum. Under the petition, the plaintiff, perhaps, would have been entitled to a revivor of the writ, but the judgment obtained is clearly a judgment as upon debt. From this judgment alone, must we determine the effect of plaintiff's proceedings, whether a *scire facias* to revive the writ, or judgment upon a debt. A *scire facias* is a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment. *Jarvis v. Rathbone*, Kirby's Comr. Rep., 220. A *scire facias* to revive a judgment is only a continuation of the former suit, and is not an original proceeding. 2 Tidd, 988; 1 T. R., 257. In the case of *Woolston v. Gall & Bodine*, 4 Halst. (N. J.) Rep., EWING, C. J., says that "it has been more than once determined that on *scire facias* the justice is to render judgment that execution issue

and for costs, and cannot render a new judgment for the amount of the original debt, and interest and costs thereon." Under a proceeding by *scire facias*, no new judgment should be entered, but the entry should be, that the plaintiff have execution for the judgment mentioned in the *scire facias*, and costs. *Viedenberg v. Snyder*, 6 Iowa, 89. Concluding, therefore, that the judgment of 1854 was not one that revived the right to enforce the former judgments, but that it was a judgment as upon a debt, the liens created by the former judgment ceased to exist, and became merged in the new judgment.

The Hauns, previous to this last judgment, had sold and transferred to Cox all their right, title and interest in the said school lands, and if the plaintiff had any liens, by virtue of the former judgments, against their equity in said land, they were lost, by the effect of the new judgment. Granting, however, that this new judgment was one of revivor only, would this place the plaintiff in any better condition? The statute provides that the lien of the judgments shall continue only ten years from the date of the judgment. While the law provides for the revival of the writ which expires in five years, yet there is no provision allowing the revivor of the lien of the judgment, so as to extend it beyond the limits fixed by the statute. Upon authority, we think that the lien can continue ten years only, and it cannot be extended beyond that time. A revivor of a judgment by *scire facias* creates no new lien. If a plaintiff does not sell the land within ten years, if he wishes to continue his lien without sale, then he must have a fresh judgment docketed before other creditors come in and obtain judgment; otherwise he loses his preference. *Ex parte Penn. Iron Company*, 7 Cow., 540; *Graff v. Kiss*, Id., 619; *Little v. Hawley*, 9 Wend., 157; *Ex parte Lawrence*, 4 Cowen, 417. In *Purdy v. Doyle et al.*, 1 Paige Ch. R., 558, it is held that where a creditor has obtained a lien

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upon real estate by judgment at law, if he subsequently brings an action of debt on his judgment, and recovers a new judgment, he will lose his first lien.

The revivor of a judgment by *scire facias* within ten years after the docketing thereof, will not continue or extend the lien of the judgment beyond the ten years, as against purchasers or incumbrancers whose rights accrued subsequent to the entry of the original judgment. *Mower and wife v. Kiss et al.*, 6 Paige Ch. R., 88. After ten years from the docketing, a judgment ceases to be a lien on the real estate of the defendant in the judgment, as against *bona fide* purchasers or subsequent incumbrances, and lands purchased after the ten years are elapsed, are held free and discharged of the lien. The ten years commence running at the time of the original docket, and the lien is not saved by subsequent revivors by *scire facias*. *Tufts' Adm. v. Tufts*, 18 Wend., 621. The statutes upon which the rights of the parties in this case were adjudicated, read as follows: "All judgments hereafter to be rendered shall cease to be liens or incumbrances on any real estate, against *bona fide* purchasers or subsequent incumbrances, by mortgage, judgment or otherwise, from and after ten years from the time the same shall be docketed." If the liens of the judgments of 1847 and 1848 could not be extended beyond the ten years, then the sale was not made in time to retain to plaintiff the liens. In either view of the case, the judgment of the District Court was correct.

Affirmed.

VANDALL V. VANDALL *et al.*

1. **PRACTICE: WAIVER.** A party cannot consent by his presence and silence to the action of the court and afterwards avail himself of an objection thereto which should have been made at the time.
2. **RECORD OF THE EVIDENCE.** A record purporting to set out the evidence heard in a cause on the trial below, but which is detached from the transcript, and is not certified as either a part or all of the evidence, will not be considered by the Supreme Court.
3. **FRAUD IN SALE.** When the evidence showed that the grantor and grantee of real estate sustained to each other the relation of parent and child; that the grantor was indebted in a considerable sum, and desired to avoid the payment of the same; that the sale was made on the day the debtor demanded security for his debt; that the deed was hurriedly executed and placed on record; that the grantee borrowed all of the purchase money, and the same money was returned to the lender within a few days, and that the property conveyed embraced all the property belonging to the debtor and grantor non-exempt from execution; it was held sufficient to overcome the allegations of an answer by defendants denying fraud, and to authorize a decree declaring such sale void.

Appeal from Clarke District Court.

TUESDAY, JUNE 3.

BILL to cancel a conveyance made for the purpose of defrauding creditors. The court submitted the following special issues to a jury:

1. Did the defendant, E. C. Vandal, make the conveyance in question to the other defendant, Isaac Fouch, for the purpose of and with the intent of avoiding the payment of plaintiff's claim, and to prevent a collection of the same?
2. Did the defendant, Isaac Fouch, take the conveyance in question with a knowledge that the same was made for the purpose and with the intent of avoiding the payment of plaintiff's claim, and to prevent a collection of the same?
3. Was the consideration in good faith paid at the time of making said conveyance?

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4. Was there an understanding between the said defendants that the money paid upon the execution of the deed in question should be returned to the person from whom it was received.

Upon the first three propositions the jury found affirmatively, and upon the fourth negatively. A motion to set aside the finding was overruled by the court, and a decree was entered in accordance with the prayer of plaintiffs' bill. The defendants appeal.

D. W. Scoville for the appellant, as to the effect of plaintiffs' answer as evidence, cited *Waldron, Administrator, v. Zollikoffer*, 3 Iowa, 108; *Davis v. Stevens*, Id., 158; *Clark v. Langworthy*, Id., 563; *The State of Iowa, ex rel. The Attorney General, v. Tilghman et al.*, 6 Id., 496.

P. J. Goss and *C. C. Cole* for the appellee, as to the discretion of the chancellor in sending issues to the jury, cited *Brewington v. Patton and Swan*, 1 Iowa, 121; *Denham v. Benedict*, 1 G. Greene, 74; *Mackemer, v. Benner*, Id., 157; *Saum v. Jones County*, Id., 165; *Hemphill v. Salladay*, Id., 301; *Johnson et al. v. The United States*, Morris, 423; *Fanning v. McCrarey*, Id., 398.

BALDWIN, C. J.—It is claimed by the counsel for the appellants, that the court erred in submitting the questions of fact arising in said suit to a jury, there being no question of fact therein involved in doubt, in which the court desired the finding of a jury. It appears from the record, that four questions of fact were submitted to the determination of a jury as arising out of the evidence and pleading in the cause. It is not denied by counsel but that a chancellor may submit, under our chancery practice, certain issues of fact for the special finding of a jury; but it is claimed that from the pleadings and evidence as before the court when this cause was ordered to be so submitted, the

equities were so clearly with the respondent that no such reference was necessary. There are two objections to this position of the appellants' counsel, that meet us at the very threshold of his argument.

First. No objections were made to such submission by the counsel at the time. The party was present when such order was made, and, nothing appearing of record to the contrary, his consent to such order is presumed to have been given at the time. A party cannot sit by and consent to the action of the court, and afterwards avail himself of an objection that should have been made at the proper time.

Second. We cannot determine from the record before us what the evidence was upon which the court made the reference objected to now for the first time. There is a record before us, purporting to be the evidence taken in this cause. It is, however, detached from the transcript of the cause, and not certified to as either a part or all the evidence before the court when it ordered the reference, or rendered the final decree.

There is, however, a statement made by counsel for the appellants, of the evidence upon which the decree was entered, to which no exceptions were taken by the counsel for the appellee; and assuming that it would be proper to determine the cause upon this statement alone, we are unable to conclude that there was any error in the finding of the jury, or in the judgment of the court.

The complainant seeks to set aside a sale of certain real estate by the respondent, Vandall, to her father, Fouch, made for the purpose, as it is alleged, of defrauding the complainant, her creditor. The respondents are called upon to answer certain interrogatories, propounded to them in the petition, in relation to the sale. The answers are fully responsive, and deny all collusion and fraud, and aver that such sale was made in good faith and for a valuable consideration. Had the cause been submitted upon the

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answers of the respondents, without further evidence, as was the case in *Culbertson & Reno v. Luckey et al.*, *ante*, there could have been no doubt as to the duty of the court to have found for the respondents. It appears that other evidence was introduced to controvert these answers, and from the circumstances surrounding the transaction, such as the relation of the parties; the express desire of the respondent to avoid the payment of the debt; the sale on the day the note was asked to be secured; the haste to procure the officer to take the acknowledgment, and to place the deed on record; the fact that the father had to borrow all the purchase money, and the same money was returned to the person who loaned it, in a few days thereafter; the fact that the property sold was all the respondent had subject to sale under execution; and many other matters as detailed by the witnesses, all combined, tend to raise such presumptions of fraud, as to contradict the answers and justify the court in its decree.

Affirmed.

**THE DISTRICT TOWNSHIP OF THE CITY OF DUBUQUE V.
THE COUNTY JUDGE OF DUBUQUE COUNTY.**

1. **LAW UNCONSTITUTIONAL.** So much of § 32 of chapter 52 of the acts of 1858, as directs the County Judge to apportion one half the county school fund, in equal amounts to the several School Districts of the county, is inconsistent with § 7, art. 9, of the Constitution, which requires a distribution in proportion to the number of youths between the ages of five and twenty-one years.

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Appeal from Dubuque District Court.

TUESDAY, JUNE 3.

THE facts are sufficiently presented in the opinion of the court.

H. A. Wiltse for the appellant.

W. T. Barker for the appellee.

LOWE, J. — A school tax was levied upon the taxable property of Dubuque County, under and by virtue of the provision of the school law of 1858, from which was collected \$4,445.86. Agreeably to the terms of § 32, Session Laws of 1858, p. 70, the County Judge divided the one-half of this sum in equal amounts among all the school districts within the county. The other half he divided among the school districts in proportion to the number of persons in each, between the ages of five and twenty-one years. The plaintiff remonstrated, and insists that the above act authorizing the distribution of the school tax is in conflict with the Constitution, and therefore void, and that the defendant should have divided the whole sum in proportion to the number of such persons in each district.

This suit was brought to recover the difference between the distribution that was made under the act in question, and the one that should have been made agreeably to the requirements of the Constitution. The court below held against the plaintiff, and the same question is submitted to us on the papers without argument from counsel.

We suppose that it is §§ 3 and 7 of the second division of Art. 9 of the Constitution, in relation to school funds, and school lands, upon which the plaintiff relies, as showing the invalidity of the act above referred to. The first of these sections, that is, § 3, defines what shall constitute a

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perpetual fund for educational purposes, and then concludes with these words: "*The interest of which [meaning the interest arising from the permanent school fund,] together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of common schools, throughout the state.*"

The expression "*and such other means as the General Assembly may provide,*" must include, *ex vi termini* any other funds than those named which the Legislature should authorize to be raised for the support of schools. Under the authority of the aforesaid act of 1858, the County of Dubuque levied and collected a school tax of \$4,445, for the support of schools in that county. The same act declares how this fund shall be used and distributed, namely, one-half in equal sums among all the districts of the county, the other moiety to be distributed to the districts in proportion to the number of youths between the ages of five and twenty-one. But the seventh section of the 9th Art. of the Constitution above referred to, provides that "the money subject to the support and maintenance of common schools, shall be distributed to the districts in proportion to the number of youths between the ages of five and twenty-one years, in such manner as may be provided by the General Assembly."

It is impossible for us to perceive how the act of the Legislature referred to can stand with this provision of the Constitution. They seem to be irreconcilable. The Constitution has ordained one rule, and the General Assembly has adopted and authorized a different rule, for the distribution of the same fund. The latter, of course, must yield to the former.

In reversing the judgment below, we do so upon the only question raised before us, forbearing to express any opinion of the plaintiff's right to recover in this action, against the defendant, or whether his remedy was not

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against the fund whilst in the hands of the County Judge, and before distribution.

Reversed.

ALDEN & CO. V. CARVER.

1. **REPLEVIN: CAUSE OF ACTION.** To entitle the plaintiff in replevin to recover, it must appear that he was entitled to the possession of the property in controversy at the commencement of the action.
2. **COMMON CARRIER: WAREHOUSEMAN.** A warehouseman, with whom goods carried by a Railroad Company are stored, may retain possession of the same, when so instructed by the Company, until the "back charges" thereon are paid.

Appeal from Pottawattamie District Court.

TUESDAY, JUNE 8.

REPLEVIN. Plaintiffs shipped the goods in controversy from St. Louis, by the way of the Hannibal and St. Joseph Railroad, as they claim, under a contract with the railroad company to take them at the place of shipment and deliver them at their destination, Council Bluffs, Iowa. At St. Joseph, the goods were placed on board the steamer Dacotah, for carriage to their destination. Defendant was a warehouseman at the Council Bluffs landing, and with him the goods were left, with instructions to collect the back charges, some \$248. He also had charges for storage to the amount of thirty dollars. This \$30 was paid after the suit was commenced, and a demand then made of the goods. Trial, verdict and judgment for defendant, for the amount of the back charges and interest, and plaintiffs appeal.

Clinton and Tuttle for the appellant.

Street and Crawford for the appellee.

WRIGHT, J. (¹)—That plaintiffs were not entitled to the possession of the goods at the time this action was commenced, and that, as a consequence, the verdict against them upon that issue is correct, we entertain no doubt. And this for the reason, that while they did not and do not controvert the right of defendant to a lien on the goods until his charges as warehouseman were paid, and his right to retain their possession until such payment, the testimony is quite conclusive that such charges were not paid, and that there had been no demand until after the writ was issued. The petition was filed, the writ issued and placed in the hands of the sheriff; and after the officer, with his writ, and the plaintiffs had got to defendant's warehouse, the demand was made and charges paid. At the time the action was commenced, therefore, defendant was not in the wrong, and plaintiffs were not entitled to the possession of the property.

It is admitted that plaintiffs own the goods. The question in controversy, (aside from that above decided,) is, whether defendant had a right to retain their possession until the back charges were paid. There was no evidence that these had been paid by the plaintiffs. Nor does it appear, that the amount found by the jury was any greater than what was due to the carriers, with whom the contract was made. The amount due the steamer was paid by the railroad company. The defendant paid no back charges. From the pleadings, evidence, and instructions, it seems that plaintiffs denied their liability to pay the steamer's charges; they insisting that they contracted with the rail-

¹ BALDWIN, C. J., having been of counsel, took no part in the determination of this cause.

road company, and the goods were shipped upon the boat without their consent, express or implied. But this amount having been paid by the first carriers, we do not see how this claim of plaintiffs can avail them. True, it was paid after the commencement of the action, but while this is set up in a supplemental pleading, and issue thereon joined, it is nowhere, during the whole trial, intimated that the *time* of payment would change or affect defendant's rights. Indeed, it may be remarked, that aside from the petition, the pleadings and proceedings are strangely in conflict with the positions now assumed by the parties respectively. Thus, it is claimed that the Dacotah could not recover her charges, because she obtained possession of the goods without plaintiffs' consent, and that to entitle the common carrier to a lien for freight, the relation of debtor and creditor must exist between the owner and such carrier, so that an action of law might be maintained for the debt sought to be enforced by the lien. And yet, if this rule should be granted to its fullest extent, as fully as laid down in *Fitch v. Newberry*, 1 Douglass (Mich.), 1, it could make no difference, for such charges are not owing, nor claimed by the boat, but by the party with whom the contract of affreightment was originally made. And there is no dispute but what the relation of debtor and creditor existed between plaintiffs and the Company. And then, again, while the judgment for all the back charges in favor of defendant, who had paid nothing, may seem strange, yet when it is remembered that the parties made up the issues, and tried the whole case as if the carriers, one or both, were suing for the freight, and that there was no question made but that defendant might recover for whatever was due, we have a satisfactory explanation. And therefore, while under other circumstances we might incline ever so strongly to the views presented by appellants, upon some of the errors assigned, yet, as the

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record stands, we do not see how we can consistently disturb the judgment.

Affirmed.

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121 451

GRAYDON, SWANWICK & Co. v. PATTERSON & Co.

1. **PROMISSORY NOTE: PAYMENT IN CURRENCY TO AN AGENT.** Ordinarily the holder of a promissory note is not bound to receive in payment of the same anything but money or coin at its true value; and if the holder is a mere agent, he has no right, unless specially authorized so to do, to accept any thing else in lieu of money.
2. **SAME.** A payment in currency to the holder, who was the collecting agent of the payee of a promissory note, of a sum equal to the amount due thereon, does not when not controlled by some custom known to, or some authority conferred or ratified by, the principal, operate to discharge the notes.

Appeal from Dubuque City Court.

WEDNESDAY, JUNE 4.

PLAINTIFFS sue upon a note payable to the order of Graydon, McCreary & Co., at the Bank of Langworthy & Bros., in Dubuque. The payees indorsed it in blank, and delivered it to the plaintiffs. Before maturity, it was sent to the bank for collection. From the testimony, it appears that one of the defendants had funds on deposit with the bank, and drew his check, payable in currency, for the amount of the note, and handed the same to the bank officers. Langworthy & Bros. then wrote on the note that they had received the full amount thereof, (stating it,) in "Illinois currency," and gave to defendants a receipt to the effect, that the note had been paid without specifying in

what or in what manner. It appears that they were doing a general collecting and banking business; that it was their custom to take currency in payment of notes sent to them for collection; that the currency thus paid or received varied with the kind then used in the community; and that the check received, had never been tendered back to defendants, nor the currency therein named, when the note was sent for collection, there were no instructions given as to the manner of its collection; nor as to the funds they were to receive.

The court charged the jury, that this currency could not be regarded as payment, unless the bank was instructed to receive it, or the plaintiffs afterwards accepted it.

Verdict and judgment for plaintiffs.

Bissell, Mills & Shiras for the appellants, contended: 1. That when a note is sent to a bank for collection, and the bank presents such note for payment, and receives without objection, the check of the makers drawn on the bank, in which such makers have funds, payable in currency used by business men in the ordinary transaction of business, it amounts to a payment of the note. *The Bank of Orleans v. Smith*, 3 Hill, 560. 2. That as the evidence shows that it was the custom of the banks in Dubuque to receive checks upon themselves, payable in currency, in payment of notes held by them for collection, a payment made in that manner without objection discharged the note; and if the bank has violated instructions, the plaintiff must look to it, and not to the defendant for damages; 8 Yerg. (Tenn.), 175; 2 Port., 280; 2 Stark. Ev., 1886 (Phil. ed. 1834); *Camidge v. Allenby*, 6 Barn. & C., 375.

J. M. Griffith & W. J. Knight for the appellee, contended: That an agent to collect a debt has no authority to receive

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anything in payment of it except *money*, unless he is specially authorized to do so, or after he has done so, the principal ratifies the act; *McCarver et al. v. Neally*, 4 G. Greene, 360; *Powell v. Henry*, 27 Ala., 612; *Corning et al. v. Strong et al.*, 1 Ind., 330; *Kirk et al. v. Hiatt et al.*, 2 Id., 322; *McCulloch v. McKee*, 16 Penn. St. R., 289; *Todd v. Reid*, 4 Barn. & Ald., 210.

WRIGHT, J.—There is no pretense that plaintiffs accepted the currency, nor that they had any knowledge of the check drawn by the defendants for the same. Nor is it shown that they had any knowledge of the custom of the bank, referred to in the testimony. It is equally clear, we think, that while the note was indorsed in blank, defendants were aware that it belonged to plaintiffs, and that Langworthy & Bros., were merely collecting agents. Plaintiffs were, therefore, not required to return the check, unless they are bound by the act of the bank in taking it, and if they are, then the note is paid, and a return would be unavailing.

Our opinion is, that unless authorized to receive currency, or unless the act was subsequently in some manner ratified, the bank had no authority to take it, and the note would not be paid. The rule is, that payment should ordinarily be made in money or coin, and the holder is not bound to accept anything but such money at its true value. And if the holder is a mere agent, he has no right, unless specifically authorized so to do, to accept anything else in lieu of money. (Story Pro. Notes, §§ 389, 115; *Jackson v. Bartlett*, John., 361; *Kellogg v. Gilbert*, 10 Id., 220; *Custer v. Tolcot*, 10 Vermt., 471; *McCarver v. Neally*, 1 G. Greene, 360; 2 Parsons on Cont., 126, n. b.)

"Illinois Currency," or "currency," is not money. (*Bindshoff v. Barrett*, 11 Iowa, 172.) And aside from some custom authorizing it, authority from the payees to that effect, or ratification, as above explained, the agents had no

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right to receive such "currency," or anything else than money.

Affirmed.

WHITE V. HAMPTON *et al.*

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1. **TRUSTEE: REFUSAL OF TRUSTEE TO ACT.** A trust will not fail because a trustee refuses to act; neither will the beneficiary, in a court of equity, lose his interest in an estate by the disclaimer or refusal of the trustees to accept the trust.
2. **RECORD OF MORTGAGE.** In an index entry of a mortgage filed for record, the words "see record" were written in the column in which the description of the lands should have been set out, instead of such description: *Held*, that it was sufficient to charge a subsequent incumbrancer with notice, following *Coleman v. Bouman and Neal*, 10 Iowa, 529; *Bostwick v. Powers*, 12 Id., 456.
3. **MORTGAGE: ASSIGNMENT: MERGER.** The acquisition of the absolute title to real estate by a mortgagee of the same, after an assignment and transfer of the mortgage to a third person, does not operate to merge the mortgage.
4. **SCHOOL FUND MORTGAGE: ASSIGNMENT.** Where the first incumbrance on a parcel of real estate was a mortgage to the school fund commissioner to secure the repayment of a portion of the school fund, loaned nominally to the mortgagor, but in fact to one of the sureties, who on the same day became a second mortgagee of the same premises, and subsequently, and after the assignment of his mortgage to a third party, acquired the absolute title: and after a third incumbrance was placed upon the property by the grantee of the first mortgagor (who was the second mortgagee) the assignee of the second mortgage paid to the school fund commissioner the amount due upon the first mortgage, whereupon it was assigned to him by said commissioner, (without recourse;) it was held, that a court of equity would not treat this payment as a satisfaction of the mortgage, but would compel the third incumbrancer to refund the amount thus paid by such assignee for the redemption of the property.
5. **REDEMPTION BY JUNIOR INCUMBRANCER.** Where the prayer of a petition filed by a junior incumbrancer prayed for leave to redeem the incumbered property from the lien of the senior mortgage, it was held that a

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decree ordering a sale of the property by a commissioner, and a further decree confirming the sale made by such commissioner to the junior incumbrancer, for a sum less than the amount of the mortgage debt, and ordering, that upon payment to the senior mortgagee of the sum bid for the property at the sale, the satisfaction of the senior mortgage should be entered upon the proper record, were erroneous.

6. **APPEAL.** In an action by a junior incumbrancer against a senior mortgagee, in which two decrees are rendered, the respondent may appeal from the second decree notwithstanding a year has expired since the first one was rendered upon default for want of an answer.
7. **EXECUTION OF DECREE.** In a proper case a court of equity may issue a proper process to enforce the execution of a decree ordering the surrender of lands.

Appeal from Washington District Court.

WEDNESDAY, JUNE 4.

THIS case has been twice before in this court. (9 Iowa, 181; 10 Id., 238.) The questions now made arise between complainant and the holders of certain incumbrances on the lands included in the deed of trust made by Hampton; for which see the opinion. Respondents appeal.

Edmonds & Ransom for the appellant.

Grant and Smith and *Rush Clark* for the appellee.

WRIGHT, J.—1. It is first claimed that the trust-deed is inoperative, because of the failure of complainant to comply with and perform certain conditions set out in the instrument, without which, by its terms, it was to have no effect or force. We do not deem it necessary to follow counsel through the very many positions assumed under this head, to discuss whether the condition referred to is precedent or subsequent, nor whether complainant was sufficiently prompt and diligent in asserting his rights under the deed. All these questions were presented by counsel when this case was last before us, were examined, passed upon, and

we see no good reason for traveling over the same ground again. The ruling then made we believe to be in accordance with the testimony, equity and good conscience, and it will not be disturbed.

Akin to this point is the further position that the estate was never vested in the trustee, but was retained in Hampton, inasmuch as the trustee refused to accept the trust, that no one can be invested with this character by mere gift or nomination, that it required his consent. This point, also, was substantially passed upon before, for the rule is there recognized that equity will not allow a trust to fail because of the refusal of the trustee to act. And we are not aware of any authority which recognizes the doctrine that a beneficiary will in a court of equity lose his interest in an estate, by the disclaimer or refusal of the trustee to undertake the trust. (And see *Leffler v. Armstrong*, 4 Iowa, 482.)

II. It is next claimed that Lyon did not have notice of this deed at the time he took his mortgage. The trust-deed was recorded, but it is claimed that it was not indexed as required by § 1213 of the Code. This section was complied with in every respect, except that in the column where the description of the land should be, the recorder wrote, "see record." This precise question was ruled against appellant's position in the cases of *Calvin v. Bowman and Neal*, 10 Iowa, 529; *Bostwick v. Powers*, 12 Id., 456. This ruling is therefore affirmed.

III. Francis Hepburn owned a portion of the land covered by the trust-deed, on the 24th of March, 1855, and on that day executed a mortgage to Hampton, to secure the sum of \$625, due in one year. Hampton assigned the mortgage and note for which it was security, March 27, 1855, to Terrill, who assigned to Sharp in May, 1858, who assigned to Lyon, in June of that year. June 16, 1855, Hepburn conveyed the same premises to Hampton. July

14, 1856, \$500 was paid on this mortgage. The court below decreed that \$125 of the proceeds of the lands covered by this mortgage, and sold under the trust-sale, be paid to Lyon. Lyon says this was not enough, but that he should have been allowed six per cent interest on the note from its maturity, deducting the payment of \$500, July 14, 1856. And we do not see why this position is not correct. The doctrine of merger, referred to by appellee, has no application; for when Hampton took the title from Hepburn he was not the holder of the mortgage, but had parted with his interest to Terrill. Nor did he own it at any time after he took the fee.

IV. A mortgage was made by Hepburn on the 24th of March, 1855, to Parrott, as School Fund Commissioner, to secure the \$400, borrowed from the school fund. This mortgage was upon the same lands included in the mortgage of the same date to Hampton. The interest was paid on the loan to January 1, 1857. April 24th, 1858, the holder delivered the note to Sharp, with this indorsement: "Pay to the order of O. H. Sharp, without recourse. John Parrott, S. F. C." — and the mortgage, also, thus: "For value received I hereby assign the within mortgage to O. H. Sharp, without recourse. John Parrott, S. F. C." May 16, 1858, this note and mortgage were transferred by Sharp to Lyon. The bill was filed in this case in September, 1856. The court below found that this mortgage was discharged by payment, was not transferable, and that satisfaction thereof should be entered of record.

It is not pretended that this mortgage was paid in the usual sense of that term, but that when Sharp paid the amount thereof to the Fund Commissioner, it was the duty of that officer to acknowledge satisfaction, that he had no right or power to transfer it, and that the assignee acquired no right thereby to demand of the mortgagor or another incumbrancer the amount thus paid. In other words, it is

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claimed that when the commissioner received the money, the mortgage in equity ceased to be a lien on the premises, and that complainant, as a subsequent incumbrancer, is not bound to pay the same in order to redeem. This position is not tenable, to the extent claimed.

Public policy dictates, it is true, that the commissioner shall not be allowed to trade in or negotiate these securities. But the question here is, suppose a third (subsequent) incumbrancer, in good faith, tenders to him the full amount of the claim, (and this is the case before us,) is he not bound to accept it, and can a holder of a second lien, in conscience and equity, claim that the first lien, by such acceptance is extinguished? Most clearly not. By the redemption, the third incumbrancer becomes substituted to all the rights of the original mortgagee. It works no injury to the second mortgagee, and he ought to bear the burden of it, as he was liable to do before. The interest of all these incumbrancers was to have the first mortgage satisfied, and though the commissioner had no power to sell and transfer it, so as to bind the fund or the county, a court of equity will compel a subsequent incumbrancer to refund the amount so paid for its redemption. A note and mortgage to this officer are not invested with such unusual properties and qualities, as to take them out of this general rule.

It is urged, however, that the loanee executed her note with two sureties, as required by § 1101 of the Code, that these sureties are solvent, and that Lyon, as against complainant, should pursue his remedy against them. A sufficient answer to this position is found in this fact. Hampton was one of these sureties, and the testimony conclusively shows that he was in fact the principal, the mortgagor (Francis Hepburn,) being so nominally. The loan was for his benefit, and he in equity is bound to pay it. Lyon

therefore has a right to insist that the debt shall be made out of the mortgaged property.

Another question in the case arises under the appeal of Parrott, as school fund commissioner, upon the following facts: Prior to the trust deed of complainant, Hampton made a mortgage to Parrott on lot 6, block 62, in Iowa city, to secure the sum of three hundred dollars. This lot was sold under complainant's decree, and bid in by him for one hundred dollars. The report of the commissioner making the sale, was in all respects confirmed, and an order made that the \$100 should be paid mortgagee, and that the mortgage should thereupon be entered satisfied upon the proper record. It is now insisted that the lot could not be discharged from the lien of the mortgage until the amount actually due was paid. In view of the prayer of complainant's bill, we think the position is correct. The averment is that the mortgage was made prior to the trust deed, and the prayer is that petitioner *may be allowed to redeem*. It is not asked that an account may be taken, that the amount due the respective lien holders be ascertained, the lands sold, and the proceeds applied according to priority of liens, but the prayer is to redeem. To redeem it is not sufficient to pay the amount of the sale, nor any other sum less than that actually due the prior incumbrancer. Under such a bill, the lien is not exhausted nor satisfied by a sale of the premises. White, as the holder of the subsequent lien, and by his purchase under his decree, as the holder of the equity of redemption, must not only pay the sum for which the lot sold, but the sum actually due on the prior mortgage. (*Bradley v. Snyder*, 14 Ill., 363; *Benedict v. Gilman*, 4 Paige, 58.)

The suggestion of appellee that the mortgagee does not appeal, or if so, not within one year from the rendition of the decree, and the further position that he was in default

in the court below, and cannot complain as he has been allowed \$100 when he asked nothing, is not correct, nor, to the extent claimed, sustained by the record. The decree requiring him to take the amount bid, and for that release the lien was entered in November, 1860, and the appeal taken in March, 1861. This was certainly in time. True, the mortgagee did not answer. Nor was it necessary for him to do so. Complainant asked to redeem. This was his right, and mortgagee could interpose no valid objection. But he had a right to presume that such redemption would yield to him his legal rights, the full amount due on his mortgage. If he was allowed less, or if the court established an improper rule in permitting the redemption to his prejudice, he has a right to have it corrected.

Two decrees were entered in this case, which, taken together, adjudge costs against Hampton and Lyon. Lyon insists that this was error, that he should not have been required to pay any costs. When it is remembered, however, that the matters most contested were, whether complainant's trust deed was valid, and whether Lyon's subsequent mortgage had priority, and that both these issues were found against respondent, we think the order was correct. At least, no good reason occurs to us for disturbing it.

Complainant being entitled to equitable relief, it was competent to award such process as would execute the relief granted. In a proper case, to order the surrender of the possession of lands, is an ordinary exercise of the power of the chancellor. This rule is one of practical utility, promotes justice, avoids delay, and saves expense. (*Whipple v. Farrar*, 3 Mich., 446; 1 Story's Eq. Jur., § 71; and *Thatcher v. Haun*, 12 Iowa, 310; where this rule is recognized.) There was no error, therefore, in awarding to complainant the possession of the premises bought at the commissioner's sale. The sale was made by order of court,

Caruthers v. Caruthers.

with directions to report at a subsequent term. This report was made and approved, as well as the deed made by the commissioner to the purchaser. It was competent in the same connection to award the possession, all the parties being before the court.

The cause will be remanded, with instructions to modify the decree below in accordance with this opinion, unless a final decree shall be asked in this court. In all other respects, the decree will stand affirmed. But under the peculiar circumstances of the case, each party (White, the complainant, and Lyon, the respondent,) will be required to pay half the costs of the appeal.

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78	694
13	266
99	107

CARUTHERS v. CARUTHERS.

1. DIVORCE: INHUMAN TREATMENT. An attempt to injure the person of the wife is not essential to constitute inhuman treatment to such an extent as to authorize a divorce. Acts which endanger the life of the wife by destroying her health and peace may constitute sufficient ground for divorce. *Beebes v. Beebes* 10 Iowa, 133, re-affirmed.

Appeal from Marion District Court.

WEDNESDAY, JUNE 4.

THE facts are stated in the opinion of the court.

Seevers, Williams & Seevers for the appellant.

George May for the appellee.

BALDWIN, C. J. — Petition for divorce. Cause alleged—such inhuman treatment as to endanger the life of the com-

plainant. Demurrer to the petition being overruled, respondent appeals.

The question is, whether the facts stated in the petition show that the defendant has been guilty of such inhuman treatment as to endanger the life of the petitioner. The petitioner first alleges that the defendant has been guilty of various acts of inhumanity toward her, and that she believes the defendant has committed such outrages with a design of destroying her peace of mind, and undermining her health, and thus endangering her life. As specifications under this averment, various acts of unkindness are charged, such as petty annoyances, groundless complaints, requiring her to do the labor of a man upon the farm, maltreatment toward her children, &c., neither of which are alone sufficient upon which to predicate a charge of such inhuman treatment as to endanger the life.

The petitioner, however, charges that defendant went away to Kansas and left her to provide for the family, to raise the crop, &c., and that, upon his return, defendant's "conduct and intercourse with petitioner were especially tyrannical, exacting, and over-bearing, often brutal; that he has frequently threatened to whip petitioner, that he did not intend to live with her, as his wife any longer, that if she did not conduct herself differently, he did not know what he might be provoked to do, and other and numerous wrongs and injuries committed against the rights of petitioner, destroying her peace and quietude, and producing such fear, and anguish, and sorrow, as she verily believes is endangering her life," &c. A construction of the language of the statute, upon which this complaint is made, has already been given, and the proper rules to guide the courts of our state in determining whether the conduct of a husband or wife is of such inhuman character as to endanger the life of the other, are so fully and clearly pointed out by WRIGHT, C. J., in the case of *Beebe*

v. *Beebe*, 10 Iowa, 133, that we deem it useless, in this case to but apply the principles as therein stated. It is conceded that the charges of cruelty are not so specifically stated, as to lead us to the conclusion that the pleading is unexceptionable, but the question is, whether, taking the whole of the complaint together, does it not, if true, show such a disposition of mind upon the part of defendant as would justify the chancellor in concluding that the life of the complainant was endangered, by compelling the parties to live together. That the defendant's treatment of his wife, in threatening to whip her, to drive her from his home, in exacting labor that none but a man should perform, driving her children from her without cause, &c., is inhuman, none would undertake to controvert. This kind of treatment of a person of the advanced age of complainant, (the bill shows that they were married in 1833,) might so affect her mind as to destroy her health, and ultimately endanger her life. This, of course, would depend upon the evidence. The material inquiry is, (see *Beebe v. Beebe*, *supra*.) whether the life of the complainant is endangered, or will be, by the continuance of the cohabitation. There may have been no act done in the way of attempting the apprehended injury, and yet the court can as well see that there is danger, as though there had been many attempts.

The party complaining has a right to be relieved from apprehended danger, and need not wait until there is an attempt made to carry the threat into execution. The complainant charges that there is a systematic attempt upon the part of defendant to destroy her peace of mind and health. The threatening to whip, to drive her from home, the exacting of labor amounting to cruelty, abuse of children, &c., &c., are the specifications tending to show the defendant's inhumanity. If it should appear that such

The State of Iowa v. Jones.

acts endangered the life of the complainant, the law grants her the relief prayed for.

Affirmed.

THE STATE OF IOWA V. JONES *et al*

1. **INDICTMENT FOR CONSPIRACY.** It should appear on the face of an indictment for conspiracy, that the object of the conspiracy was criminal, or that the means to be employed in attaining it were criminal.
2. **SAME.** The words "to cheat and defraud," without more, do not necessarily imply a criminal object when alleged as the purpose of a conspiracy.

13	299
104	799

13	299
132	425

13	299
131	630

13	299
144	270
144	271

Appeal from Louisa District Court.

WEDNESDAY, JUNE 4.

C. H. Phelps for the appellant, in his argument, upon the sufficiency of the indictment, cited *Hartman v. The Commonwealth*, 5 Barr (Pa.), 66; Hawk. P. C. B., 2, ch. 25, § 60; *Commonwealth v. Eastman*, 1 Cush., 189; 1 L. Cr. C., 264, and notes on 294; *The Commonwealth v. Hunt*, 4 Met., 111; *The People v. Lambert*, 9 Cow., 578.

C. C. Nourse, Attorney-General, for the State, upon the same point, cited *The State v. Buchanan*, 5 Harris & John., 329; *The State v. Rowley*, 12 Conn.; *The State v. Burnhame*, 15 N. H., 396; *Commonwealth v. Mifflin*, 5 Watts & S., 461; *Commonwealth v. Warren*, 6 Mass., 73; *Commonwealth v. Davis*, 9 Id., 416; *The People v. Richards and Patton*, 1 Mich., 217; *Twitchell & Norton v. The Commonwealth*, 9 Barr.

LOWE, J.—On the 22d day of July, 1857, Robert Wilson executed and delivered to one N. W. Burris, a promissory note of \$5,850, payable twelve months after date. This note was indorsed in blank by Burris to Geo. A. Jones, one of the defendants in this prosecution. Afterwards, on the 22d of March, 1859, said Jones instituted a suit on said note, making Wilson, the payer, one Sylvanus Dunham, surety, and Burris, the indorser, parties, alleging in his petition, that Dunham had signed said note as surety after the same had been executed and delivered by Wilson. At the trial, Dunham's defense was a denial, under oath, of the execution of the note by him. The plaintiff, Geo. A. Jones, called his co-defendants in this case, J. B. Jones, Gustavus Jones, and A. W. Kelly, to prove the execution of the note by Dunham, which fact they testified to, and the court, on the hearing of the cause, discharged Dunham, upon the ground, that it appeared from the evidence, that if Dunham signed the note at all, he did so after its maturity, and therefore was not liable in the suit in which he was impleaded.

After this, upon the complaint of Dunham, the grand jury of Louisa county found an indictment against the defendants in this prosecution, consisting of two counts, but substantially of the same import, the first of which is as follows: (omitting the formal parts.) * * * *
“do find and present that Geo. A. Jones, J. B. Jones, Gustavus Jones and A. W. Kelly, on or about the 15th day of February, 1859, at Louisa county, and State aforesaid, being then and there persons of evil minds and disposition, together wickedly devising and intending to cheat and defraud one Sylvanus Dunham, did then and there, falsely and fraudulently, maliciously and unlawfully, conspire, combine, and confederate, and agree among themselves, to cause said Sylvanus Dunham to be impleaded in the District Court of said county of Louisa, and did then

and there fraudulently and falsely institute a suit at law and civil action in the District Court of Louisa county, upon a forged and fictitious claim and demand, and afterwards, &c., in execution of said last mentioned premises, and in pursuance of said conspiracy, by means of false swearing and willful and corrupt perjury, did then and there attempt to procure a judgment, &c., upon the said false, forged and fictitious instrument, claim and demand for a large sum of money, to wit: six thousand eight hundred dollars, by means whereof, &c., defendants then and there intended to cheat and defraud the said Dunham out of six thousand eight hundred dollars."

The second count charges substantially the same thing, and both aver that the defendants knew the writing to be forged and fictitious.

A motion to quash, and a demurrer to the sufficiency of this indictment, were severally overruled, the parties tried and convicted. The same questions were raised anew under a motion in arrest and for a new trial, and are now presented for our consideration.

The most important of these, which have attracted the greatest attention from counsel in argument, is the inquiry, whether the facts charged, amount in law to an indictable conspiracy. It is believed that under the current of English authorities, and perhaps some of the earlier American decisions, which need not now be recited, the form of the above indictment could be sustained, and would be held to be sufficient. In the more modern American adjudications, there has been a tendency to greater strictness in the presentment and trial of conspirators. These later decisions, we are inclined to follow upon principle, believing that they have succeeded in fixing some definite and assignable limits to what is meant by the offense of conspiracy, which, heretofore, was admitted to be uncertain, complicated and difficult to be defined; and to this extent,

also, they seem to be more in accord with the genius and theory of our *bill of rights*, which requires that "in all criminal prosecutions, the accused shall be informed of the accusation against him."

They hold, for instance, that it should appear on the face of the indictment, that the object of the conspiracy is a criminal one, or else, if the purpose thus disclosed does not import a crime, then other facts should be alleged and set forth, so as to show that the means to be employed are criminal, thereby withdrawing the crime of conspiracy from the limitless field of wrongful acts, where the old authorities had allowed it to go, to the more circumscribed range of the criminal Code, either as a means or an end. This brings both elements of this compound offense, to wit: the combination and the injury contemplated, under the clear and more certain control of the courts.

In the States of Maine, New Hampshire, Massachusetts, Vermont, New York, New Jersey and Pennsylvania, it has been settled that a general charge of a conspiracy to effect an object not criminal, is not sufficient, and that a charge of such a conspiracy is to be accompanied with the further statement of the means agreed to be used to effect the object, and those means must appear to be criminal. 1 Lead. Crim. Cases, by Bennett and Heard, 264 and notes; 1 Cushing, 189; *Commonwealth v. Eastman et al.*, 7 Id., 514; *Same v. Shedd et al.*, 4 Metcalf, 111; *State v. Roberts*, 34 Maine, 320; *State v. Hewitt*, 31 Id., 386 and 396; 15 New Hampshire, 396; 9 Cowen, 578; 4 Halsted, 293; 5 Barr, 60.

Tested by the doctrine laid down in these cases, the charge of conspiracy in the indictment before us, we apprehend, will be found insufficient. The words "*to cheat and defraud*" Dunham of his money, *without more*, do not necessarily imply a criminal object, either at common law, (see the above authorities, and also 2d Bishop on Crim. Law, 117, 119, &c.) nor under our statutes, which, like the common law,

make them criminal only when they are accompanied by some false pretenses or artifices. It will be observed that no such false tokens or symbols are alleged and set forth, as to indicate clearly, and with technical precision, the nature of the offense, or, indeed, whether any offence at all had been committed, not even a wrong, for such are the multiplied phases of business transactions and human conduct in a moral aspect, that they range all along up from slight improprieties to crimes of the first magnitude, and according to the refined ethics of some, the words cheating and defrauding would be applied to acts for which a party could not be held liable, even in a civil suit, much less criminally.

We remark, however, that this omission may be aided by a particular statement of the illegal means by which the object was to be effected; for the theory of this peculiar crime is such, that, however lawful the purpose of the conspirators may be, yet, if by a corrupt combination they reach that purpose through or by virtue of criminal means, the offense is consummated.

The remaining question, then, for further consideration, is whether, inasmuch as the object of this conspiracy is not shown upon the face of the indictment to be criminal *per se*, it is aided by a sufficient statement of the criminal means to effect the proposed object.

The substance of this part of the charge is, that the defendants corruptly agreed among themselves to cause one Sylvanus Dunham to be falsely impleaded in a civil action on a forged note, and, in pursuance of their conspiracy, did attempt, by means of corrupt perjury, to obtain a judgment for \$6,800 on said forged instrument, and thereby intended to defraud said Dunham of said sum of money, &c.

Now, the only illegal part of the means here set out and to be employed, is the false swearing, but whether defendants had corruptly concerted together to swear falsely, in order to maintain the suit against Dunham, is not averred,

Reeder v. Carey.

nor can it be inferred from the structure or manner in which the charge is laid, except by the merest intendment, which the law does not allow in criminal procedure. It is very evident that the defendants corruptly agreed that they would institute a civil suit upon forged paper, and obtain, if possible, a fraudulent judgment, but whether, in order to compass this end, they had a previous understanding that they would forswear themselves, must clearly be a matter of conjecture from the language employed, yet such an unlawful agreement should be distinctly alleged as an indispensable element in showing a conspiracy from the use of criminal means. We are compelled to hold, therefore, that the indictment was insufficient, and that the motion in arrest should have been sustained.

We are not persuaded, from the examination which we have made of the instructions given and refused, to which exceptions were taken, that the court had committed any substantial error, especially upon the theory that the indictment before it was a good one, and therefore we deem it unnecessary to express in detail our views with reference to them.

The judgment below will be

Reversed.

REEDER V. CAREY *et al.*

1. MORTGAGE: ORDER OF PAYMENT, Where C executed a mortgage to secure the payment of a sum named, six months after date, and a further sum two years after date, and the mortgagee afterwards assigned a portion of the sum last maturing to G, and all of the remainder to R, it was held that the proceeds arising from the sale of the mortgaged premises should be applied, first, to the satisfaction of the sum first maturing; second, to the satisfaction *pro rata* of the claims of the assignees of the last payment; following *Grapengether v. Fejervary*, 9 Iowa, 164; *Ramlin v. Major*, Id., 297.

Reeder v. Carey.

Appeal from Lee District Court.

THURSDAY, JUNE 5.

IN March, 1858, Carey executed a mortgage to Poor, to secure \$157.50 in six months, and \$540 in two years, from date. In April, 1859, the mortgagee assigned \$150, "*being part of the last payment*," to Gorgas, and in May, 1860, assigned the mortgage, and all rights under the same, to complainant. The court below held that the mortgaged premises should be sold, and from the proceeds, Gorgas should be first paid the amount assigned to him, and from this order complainant appeals.

Tho's F. Withrow for the appellant, cited *Grapengether v. Fejervary*, 9 Iowa, 164; *Rankin v. Major*, Id., 297.

Cook & Drury for the appellee, relied upon *The Mechanics' Bank v. The Bank of Niagara*, 9 Wend., 410.

WRIGHT, J.¹ — It seems to us that the principles recognized in *Grapengether v. Fejervary*, 9 Iowa, 164, *Rankin v. Major*, Id., 297, and *Sangster v. Love*, 11 Id., 580, sustain appellant's position, and that the decree below should be modified accordingly. The fact that notes were not executed by the mortgagee, and that the only evidence of indebtedness is the mortgage, cannot change the rule. The complainant held and owned the amount first due, (\$157.50,) and this should be first paid. The remaining proceeds, if any, should be applied *pro rata* to the satisfaction of the claims held by the parties in the last payment.

It is proper to say that this is a controversy between the assignees of debts secured by the mortgage, and not between the mortgagee and the assignee of a part of the debt, as in

¹Low, J., being interested took no part in the determination of this cause.

Jones v. Jones.

The Mechanics' Bank v. The Bank of Niagara, 9 Wend., 410. Not only so, but there the court held that the parties had by agreement given priority to the assignee.

Decree modified as above, and entered in this court, if desired.

JONES v. JONES *et al.*

1. **LEVY OF EXECUTION UPON PERSONAL PROPERTY.** In equity a judgment creditor will be compelled to exhaust the personal property of a judgment debtor before resorting to real estate purchased by a third person, of such debtor, in good faith and for a valuable consideration, before such judgment was rendered, but which by reason of a mistake in descriptions was not conveyed at the time the lien attached.
2. **COPARTNERSHIP: JOINT AND SEVERAL PROPERTY.** A court of equity will not enjoin the sale of individual property of a copartner to satisfy a judgment against the firm of which he is a member, upon the ground that it has not been made liable by *scire facias*, when it is not alleged that the judgment was against the firm, and not against the individual members thereof; or when no issue is presented negating the fact that the property has been made liable by such process. *Quere.* Does the right to object to the levy of an execution on this ground extend to one claiming under the debtor?
3. **BILL AND ANSWER.** When the allegations of a bill are explicitly denied in the answer and the cause is submitted without proof to sustain the affirmative allegations of the bill, the chancellor must find against the complainant.
4. **WAIVER OF DEFAULT.** A default is waived by the filing of an answer, without leave of court, if the adverse party fails to object to such filing and joins issue upon the allegations thereof, and submits such issue, upon the pleadings, to the court.
5. **JUDGMENT LIEN SUBJECT TO EQUITABLE INTEREST.** The lien of a judgment creditor upon the land of his debtor is subject to all the equities which exist in favor of third persons against such lands at the time of the recovery.

Jones v. Jones.

7. EVIDENCE: ANSWER. The answer of one defendant cannot be read in evidence against his co-defendant when there is no joinder or privity of interest, or fraud, or collusion, or combination between them.

Appeal from Polk District Court.

THURSDAY, JUNE 5.

EDWIN BROWN procured an execution on a judgment in his favor, and had the same levied upon certain lands. The complainant filed his bill, and obtained an injunction restraining such sale. Afterwards, this injunction was dissolved, and the bill dismissed as to Brown, and the sheriff, from which complainant appeals.

Phillips & Phillips for the appellant.

I. The judgment was against the firm of Campbell, Jones & Co., and an execution issued against the joint property of the firm could not be levied upon the separate property of John C. Jones. Until after *scire facias* the judgment could not become a lien upon the personal property of the members of the firm. Code of 1851, §§ 1690, 1691; Revision of 1860, § 2785.

II. It is a well settled rule in equity that the lien of the judgment creditor upon the lands of the debtor is subject to all the equities which exist in favor of third persons at the time of the recovery of such judgment. *Keirsted v. Avery*, 4 Paige Ch., 9.

III. The answer of Jones and wife was evidence against their co-defendants, for the reason that their co-defendants claimed to hold the land through them. 1 Greenl. Ev., 190, 191.

Oasady & Polk for the appellee.

I. The point made by appellant, that the judgment is against the firm, and can be enforced by *scire facias* only

against the property of the members of the firm, is not presented in the bill; neither is it alleged that the proper steps have not been taken under the Code to make the property liable.

II. The rule of law stated in Greenl. Ev., § 178, has no application to the case at bar. *Osborne v. The Bank of the United States*, 9 Wheat., 738; *Ayres v. Campbell*, 9 Iowa, 213. The rule itself has been questioned by many courts. *Field v. Holland*, 1 Greenl. Overruled Cases, 187; *Mosley v. Armstrong*, 3 Monr., 287; *Ward v. Davidson*, 2 J. J. Marsh, 443; *Rees v. Lawless*, 4 Litt., 218; *Doyle et al. v. Sleeper and Alsop*, 1 Dana, 531. The answer can be read in evidence only when the allegations would bind the co-defendant as admissions or confessions, Cow. & Hill's Notes, Phil. Ev., part 1; *Gray v. Harrison*, 2 Hayne, 292; *Weedman v. Kahn*, 4 S. & R., 174; *Jackson, ex dem. Watson, v. Oris*, 11 John. R., 437; *Chess v. Chess*, 1 Penn., 82. The old chancery rule as to the effect of an answer was changed and modified. *Shepard v. Ford*, 10 Iowa, 502; *Williamson v. Haycock et al.*, 11 Id., 40; *Mobley v. The Dubuque Gas Light & Coke Company et al.*, Id., 71.

WRIGHT, J. — If the cause was before us to review alone the action of the court below on the motion to dissolve the injunction, filed before answer, we should feel constrained to reverse it. Complainant states in his bill that he purchased the lands levied upon and about to be sold, from one of the defendants in execution, paid therefor a valuable consideration, had his deed recorded before the rendition of the judgment, that in said deed there was a mistake, that instead of describing the lands purchased, and intended to be conveyed, (a parcel in section 33,) it described it as in sect. 13, same Township and Range; and that the defendants in the execution, (Campbell, Jones & Co. and Bryant,) had each and jointly sufficient unincumbered

property to satisfy the judgment. Now, if these facts were true, (and they were to be so taken, as the case stood at the time of hearing said motion,) then the injunction should have been continued. If the firm had sufficient property from which to satisfy the judgment, then complainant occupied such a position as that he could in equity compel the plaintiff in execution to resort to that before selling the land bought by him in good faith and for a valuable consideration, before the lien of the judgment attached.

But before this motion was heard, there was an answer, replication and *rejoinder* filed, and the record shows that the cause was "submitted upon the pleadings." That the court found that complainant's bill was not sustained, and that thereupon the injunction was dissolved and bill dismissed, as to Brown and Spaulding, (the sheriff.) The case is before us, therefore, in this attitude, and we are to determine whether, from the pleadings, complainant is entitled to relief.

Jones and wife, the grantors of complainant, by their answer admit, while Brown and Spaulding deny, every material allegation of the bill. The replication takes issue upon some new matter set up in the answer, and the rejoinder does the same as to like matter contained in the replication. The pleadings subsequent to the answer, however, are of no importance, and need not be further noticed.

Complainant insists that he was entitled to relief under the case made by the pleadings: *First*: Because the judgment was against the firm of Campbell, Jones & Co., and that before the individual property of one member of the firm could be levied upon and sold, some step, by *scire facias*, or otherwise, should have been taken to make it liable. To this position, it seems to us, there are several answers. In the first place, it does not appear, by any clear averment, that the firm was sued or the judgment

recovered against them in their partnership name. In the next place, there is nothing in the bill raising any such issue. The fact that such proceedings "to show cause" had not been taken and determined, is not negatived. For anything that appears, such steps were taken, and the plaintiff may have pursued the very course required of him by law. And finally, it may be doubted whether complainant occupies such a position as to entitle him to make the objection. If the owner of the individual property, the defendant in the execution could, *quere*, if the same right extends to one holding under such debtor.

Second: It is urged that the partnership, and each member thereof, had property from which the judgment could have been made. This is clearly and explicitly denied in the answer of Brown and Spaulding, however. And while the issue thus stood, without proof to sustain the affirmative allegation, the chancellor was bound to find it against complainant.

Third: That a default was entered against the said Brown and Spaulding, that their answer was subsequently filed, without leave of court, and should not, therefore, be considered. No steps were taken, however, to strike this answer from the files. On the contrary, it appears affirmatively that issue was joined upon it, and that the cause was submitted upon the pleadings. It is too late now, therefore, for complainant to insist that they were in default.

Fourth: It is insisted that upon the pleadings the injunction should have been made perpetual. The rule contended for is, that the lien of a judgment creditor upon the lands of his debtor is subject to all the equities which existed in favor of third persons against such lands at the time of the recovery; that a court of chancery will protect the equitable rights of third persons, *against* the legal liens of a judgment and will limit such liens to the actual interest which the judgment debtor had in the estate. Granted the rule, the

question still remains, have we a case to which it applies? For, if complainant has no equitable right to the land levied upon, then the lien of the judgment is, as to him, unlimited. This equity is denied by the answer, for while it is admitted that a deed was made, it is denied that it was intended to convey any other lands than those therein described. Is this answer overcome? Certainly not, unless the answer of the grantor, Jones, is evidence against respondent, Brown.

We are not of the opinion, however, that this case comes within the exceptions to the general rule, that the answer of one defendant in chancery cannot be read in evidence against his co-defendant. There is certainly no joint interest between the vendor, Jones, and the creditor, Brown, in the transaction. Nor does Brown claim through Jones, within the meaning of the exception as stated by Mr. Greenleaf, 1 Ev., § 178. Nor was there any fraud, collusion, or combination, between them. Indeed, Brown claims not under or through his co-defendant, Jones, but against him. True, if he takes under his execution and sale, he acquires the title of the debtor, but he does not succeed to his estate, the right of Jones does not devolve upon him, there is no such priority of estate, as that he should be bound by what Jones may state in his answer. And especially is this so, when the answer, (treated as an admission or declaration,) was made long after the party answering has parted with his title. Decree,

Affirmed.

Wiltse v. Stearns.

WILTSE V. STEARNS.

1. ATTACHMENT: NON-RESIDENCE. An allegation "that a defendant is not an inhabitant of this State" is equivalent to an allegation that the defendant is a *non-resident* of the State; and under the Code of 1851, was sufficient cause for the issuing of a writ of attachment.

Appeal from Webster District Court.

THURSDAY, JUNE 5.

ACTION ON ACCOUNT. The facts necessary to an understanding of the question determined, appear in the opinion of the court.

J. Skinner for the appellant.

No appearance for the appellee.

LOWE, J.—This suit was commenced in the year 1857, by attachment, and judgment rendered for plaintiff.

The grounds laid for the attachment in the petition, are :
1. That the defendant is not now an inhabitant of this state. 2. That he is about to remove his property out of the state, without leaving sufficient for the payment of his debts.

A motion to quash the attachment, based upon the insufficiency of these causes, was overruled, and the defendant appealed, still insisting that said motion was well made. Heretofore it has been held by this court, that the latter of these two causes was not a sufficient compliance with the Code of 1851, under which said attachment was sued out. Nevertheless, if the first cause is good, the motion was properly overruled. The Code makes the sworn statement that the defendant is a non-resident, a ground of attachment; the cause set out by the plaintiff in this case is that he is not now an inhabitant. These expressions would seem necessarily to imply substantially the same thing. Drake on

Alexander v. Doran.

Attachment, § 81, says "a resident and an inhabitant mean the same thing." A person resident is defined to be one "dwelling or having his abode in any place;" an inhabitant, "one that resides in a place." And he refers to 20 John. R., 208; 4 Wend., 602; 8 Wend., 134; 2 Kent, 481, note.

Affirmed.

ALEXANDER v. DORAN *et al.*

13	283
94	645

1. UNDENIED ALLEGATIONS IN AN ANSWER. Under the provisions of § 1740 of the Code of 1851, an allegation of usury in an answer to a petition for the foreclosure of a mortgage, when undenied by any replication or other pleadings, should be taken as true.

Appeal from Boone District Court.

THURSDAY, JUNE 5.

BILL to foreclose a mortgage. The facts are stated in the opinion of the court.

John A. Hull for the appellant, relied upon Code of 1851, § 1742; *Dunsmore v. Elliott*, 1 Iowa, 599; *Young v. Mumma*, 3 Id., 140; *Teagarden v. Baker*, 9 Id., 272; *Burlington and Missouri River Railroad Company v. Marchand*, 5 Iowa, 468; *Buckhart v. Sappington*, 1 G. Greene, 66.

Dennison & Mitchell for the appellee.

LOWE, J. — A proceeding to foreclose a mortgage, which was tried by the court upon the petition and answer alone, and a judgment rendered for plaintiff for the amount of the mortgage, and accruing interest. The appeal brings the

Vail v. Stone.

cause before us for hearing, upon its merits. The answer, among other things, admits the execution of the mortgage sought to be foreclosed, but alleges that in said mortgage there is the sum of one hundred and fifty dollars of usury and illegal interest, which the mortgage charged, and asked to be embodied in said mortgage; that this \$150 was interest over and above the ten per cent interest which was also charged, and made payable annually. This answer, uncontradicted by any replication or other pleading, must be taken as true, under the provisions of § 1742, Code of 1851. The charge of usury, therefore, being virtually admitted or established, there was no discretion left to the court, but to purge the contract of this taint, and to render a judgment for the principal sum loaned, deducting all payments which had been made. We do not feel at liberty to disregard this plain requirement of the statute, and will have to reverse the judgment below, and remand the cause for a second trial, giving the plaintiff leave to file a replication, *instantly*, if he desires to do so.

Reversed.

VAIL v. STONE *et al.*

1. **AGREEMENT: PLEADINGS.** An agreement between the parties to an action stipulating the terms upon which a decree shall be entered, when filed in open court becomes a part of the record as a pleading, and cannot, unless for good cause shown, be stricken from the files, or withdrawn upon the motion of the parties, and a subsequent pleading inconsistent therewith should be stricken from the files.

Appeal from Muscatine District Court

THURSDAY, JUNE 5.

THE facts are stated in the opinion of the court.

D. C. Cloud for the appellant.

Richman & Bro. for the appellee.

BALDWIN, C. J.—This was a petition for the foreclosure of a mortgage. The defendants indorsed upon the back of the original notice an acknowledgment of service, and an agreement upon their part, that a decree should be entered up at the following term of court, in accordance with the terms of an agreement signed by D. C. Cloud, Esq., their attorney, and filed with the papers of said cause. In the stipulation filed by the attorney, the defendants, Stone and wife, consent to the rendition of a decree for the amount due on the note and mortgage, including interest and costs, to be ascertained by the clerk of the district court, with conditions annexed in reference to the manner and time of sale, &c. Subsequent to the filing of this agreement, the defendants filed an answer, setting up the payment to the plaintiff of the sum of \$400, and that the contract sued on was usurious. This answer was stricken from the files upon the motion of plaintiff, and a decree entered upon the agreement. The defendants appeal, and the action of the court in striking the answer from the files, and disregarding the plea of usury, is the error assigned.

The Code, § 1821, provides that the parties may submit to any judgments which may be agreed upon between them, which agreement must be in writing, and filed in open court.

It is not claimed by appellants that this agreement was obtained by any false or fraudulent representations, nor do they deny the right of their attorney to enter into the agreement so filed in their behalf.

An agreement, when filed in open court, and duly signed by the parties, becomes part of the record of the case, and is in effect an answer or pleading, and unless for good cause shown should be so regarded by the court.

It is not questioned but that the parties may have such agreement withdrawn or stricken from the files, if it is made apparent to the court that it was obtained in an improper manner, but as long as it is permitted to remain as a matter of record, it is the duty of the court to regard it as binding upon the parties thereto.

The subsequent answer of defendants was inconsistent with the terms of this agreement. In the agreement the defendants consented to the rendition of a decree for the amount due on the note and mortgage, filed with the petition, with interest, &c., to be ascertained by the clerk. In their answer they plead usury, and payment. By the agreement they consent to a judgment for the amount as appears to be due from the note and mortgage, with interest; by the answer they wish to avoid a portion of the amount they conceded to be due, as well as both the interest and costs.

The two pleadings being thus inconsistent with each other, and there being no good cause shown why the one first filed should not remain as part of the record of the case, we think the subsequent answer should be stricken from the files.

If the answer was properly stricken from the files, the court could not consider the defenses therein set up. The contract itself did not show that it was a usurious one, and the usury not being brought to the attention of the court

Brownell v. Smith.

by a proper pleading, it could not, upon its own motion, take cognizance of this question.

Affirmed.

BROWNELL V. SMITH.

1. PLEADING IN JUSTICES' COURT. The plaintiff, in an action in a Justices' Court, claimed for making "a set of teeth upon silver plate;" for making a "set of teeth upon gold;" for "filling teeth" and for "extracting teeth;" giving the dates of the several items: *Held*, that the charges were sufficiently specific to require the defendant to respond thereto, and that the court below did not err in overruling defendant's motion for a more specific statement.

Appeal from Polk District Court.

FRIDAY, JUNE 6.

ACTION on account. The facts appear in the opinion of the court.

S. V. White for the appellant.

Thos. F. Withrow for the appellee.

BALDWIN, C. J. — This was an action before a justice of the peace, upon an account. In the account filed, there are five different charges, four of which are as follows: "To dental work," the other, to "extracting teeth, &c." The date of each, with the amount thereof, is set opposite to each charge. To a rule for a more specific statement of the account, the plaintiff answered by stating that one of the items of dental work was "the making of a set of teeth, upon silver plate," another "was the making of a

set of teeth on gold," another, "for extracting and filling teeth," and the other for "filling teeth."

The defendant again filed a motion for a more specific statement, and asked the court to require the plaintiff to set forth "for whom the upper teeth were made, whether for the plaintiff or for some one of his family, and for whom the filling and extracting was done, how many of each, and at what price, and whose teeth were filled, and how many." This motion being overruled by the justice, and this ruling being sustained by the District Court, the defendant appeals.

The defendant, in his application for a writ of *certiorari*, states "that he believes that a part of plaintiff's charges were made wrongfully, and without any contract with defendant, and if said charges had been specifically and fairly set out by plaintiff, he could have successfully controverted said claim."

The proceeding having been commenced before a justice of the peace, no petition was necessary, and the question is, was the account so stated as to convey to the common understanding a reasonable certainty of meaning.

The plaintiff is asked to state for whom the upper teeth were made, whether for plaintiff, or some one of his family; for whom the filling and extracting was done, &c. The account charges that this work was done for the defendant, and whether done for himself or family, the plaintiff could recover; at least the charge is sufficiently specific to require the defendant to respond thereto. An issue could have been made by defendant as to these charges, and if the plaintiff failed to prove the services rendered, or the value thereof, he could not recover. On the contrary, the defendant could have disproved the charges made, by proper evidence, as fully as if the items had been set out, as required by the motion.

A mere denial by the defendant, either written or oral, would have enabled him to show to the court that either

Corielle v. Allen.

of "the plaintiff's charges were made wrongfully, and without any contract with defendant."

Affirmed.

WRIGHT, J. — I think this judgment should be affirmed, for the reason that under the bill of particulars plaintiff could recover for "extracting" the teeth of defendant, and for the other work, if done for him, in person. If this was the case, (and I cannot presume that the work was done for others, from the language used,) the statement was sufficiently specific.

CORIELLE V. ALLEN *et al.*

1. **EXTENSION OF TIME: DISCHARGE OF SURETY.** An extension of the credit beyond the time specified in a promissory note, under a contract founded upon a good consideration, between the creditor and the principal, without the consent of the surety, has the effect to discharge such surety; and the surety may in an action at law set up such defense, and show by extrinsic evidence, if it does not appear on the face of the note, that he was in fact merely a surety; re-affirming *Kelley v. Gillaspie*, 12 Iowa, 57.
2. **SAME: USURY.** That the contract for extension of credit was supported by a note for usurious interest as its only consideration, will not avoid the effect of discharging the surety from his liability.

Appeal from Dubuque District Court.

FRIDAY, JUNE 6.

ACTION on a promissory note, of which the following is a copy:

"\$1,000.

"*Dubuque, Iowa, Dec. 7, 1855.*

"Six months after date, we or either of us promise to pay

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to Charlotte Corielle, or order, one thousand dollars, with interest at the rate of ten per cent. per annum, for value received.

"JEROME ALLEN.

"LINCOLN CLARK."

The remaining facts necessary to an understanding of the questions presented by the record, are stated in the opinion of the court.

Lincoln Clark and *Thomas M. Monroe* for the appellant, relied upon *Kelley v. Gillaspie*, 12 Iowa, 57; 9 Ala., 952; 9 Wheat., 680; 3 Binn., 520; 3 Wash. C. C. R., 70; 13 Wend., 375; 8 Port., 104; 2 Am. L. C., 279; and the cases there cited.

H. A. Wiltse for the appellee, cited *Farrington v. Galloway et al.*, 10 Ohio, 543; *Manly v. Boycat*, 18 Eng. L. & E., 351; *Myers v. Sunderland*, 4 G. Greene, 567; Story Prom. Notes, § 194; *Grout v. Ellicott*, 7 Wend., 227; Fell's Law of Guaranty and Suretyship, 211; Edwards on Bills and Prom. Notes, 354.

LOWE, J.—On the 7th day of December, 1855, the defendants executed to the order of the plaintiff a promissory note of \$1,000. Judgment by default was rendered against the defendant, Allen. Clark's defense was that he was only surety in the note, of which fact the plaintiff was cognizant; that at the maturity of the note the defendant, Allen, for a valid consideration, without the knowledge or consent of Clark, made an agreement with the plaintiff to extend the time of the payment of said note six months, which he claims had the effect to relieve him from all liability on said note, as surety.

That an enlargement of the credit beyond the time specified in the note, under a contract founded upon a good

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consideration between the creditor and the principal, without the consent of the surety, has the effect to discharge such surety, is too firmly settled to require further discussion. And it is equally well settled that the surety may set up such defense at law, and show by extrinsic evidence, if it does not otherwise appear on the face of the note, that he was, in fact, merely surety.

In support of these several affirmations we refer to 2d. vol. American Leading Cases, by Hare & Wallace, p. 271, in the case of *The United States v. Samuel and John L. Howell*, together with the notes and authorities there cited. Also 9 Metcalf, 511; 8 Binney, 520; 6 Ohio, 17; 12 Iowa, 57, *Kelley v. Gillaspie*.

This last cited case is reaffirmed, and hence if the fifty dollar note was usurious, as alleged, which had been given by Allen to plaintiff, as the consideration for extending the day of payment, it will not, on that account, avoid the effect of discharging Clark from his suretyship, for the reasons therein assigned.

The question whether Clark was, in fact, only surety on the note, and that the fact was known to the plaintiff before such extension of payment had been given, is, to our minds, quite satisfactorily shown to us, by all the circumstances attending the transaction, supported by the direct testimony of Allen, the principal in the note, who testified positively to the existence of both these facts. It is true the competency of Allen's testimony is objected to, because it had been taken in the form of a deposition previous to the time when a judgment by default had been entered against him. Whether this circumstance can have the effect to render his evidence inadmissible, it is unnecessary for us now to determine, for in any event this cause will have to be reversed and remanded on other grounds, and under our new and reformed system of practice we apprehend no question will or can be made against its introduction at a second trial of

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the cause. Nor is there any necessary conflict between his testimony and that of a Mr. Finley, who testified in behalf of plaintiff concerning the same transaction, but mostly to different and distinct facts.

On the trial of this cause there was a verdict for plaintiff against Clark, on which, after overruling a motion for a new trial, a judgment was entered. The motion for a new trial was founded, among other things, upon the giving and the refusal to give certain instructions to the jury, some of which were in conflict with the law, as laid down in the case of *Kelley v. Gillaspie*, 12 Iowa, 57; and the motion, therefore, should have been sustained.

We allude, more particularly, to the second instruction asked by defendant, which was refused, and the ninth instruction asked by plaintiff, which was given, and a similar charge given by the court, on its own motion. The judgment below will, therefore, be reversed, and the cause remanded.

Reversed.

DEAN v. GODDARD *et al.*

1. EXECUTION VALID AS TO OFFICER. An execution which showed that the judgment under which it was issued was "recovered before G. S. M." without stating that he was a justice of the peace, was not absolutely void in the hands of a constable, so as to enable him to protect himself from liability on his bond for improper or negligent treatment of property seized or levied upon by virtue thereof.

Appeal from Bremer District Court.

FRIDAY, JUNE 6.

THIS is an action against Goddard and his sureties, upon his official bond as constable. It is alleged that Potter,

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Hitchcock & Co., recovered a judgment against plaintiff, before Matthews, a justice of the peace; that an execution was issued by Tyrrell, the successor of said Matthews, which was placed in the hands of said Goddard, and by him levied upon a mare, the property of said plaintiff; that the constable abused said property, and neglected to take the proper care of her, whereby she died, &c. An answer was filed, admitting the judgment, execution and levy, but denying the negligence and improper treatment. After this, without withdrawing the former one, an answer was filed by Goddard, denying the judgment, and specifically all the allegations of the petition, except his election as constable, and the levy. The sureties also answered, without withdrawing their first answer, denying every allegation in the petition.

On the trial, the plaintiff offered in evidence the execution, a copy of which was attached to his petition, as follows:

"STATE OF IOWA, }
Bremer County, } ss.

"To any constable in said County, Greeting:

You are hereby commanded, that of the goods and chattels of Geo. R. Dean, except what the law exempts, you cause to be made the sum of fifteen and $\frac{1}{4}$ dollars, together with interest thereon, at the rate of ten per cent per annum, from the 20th day of January, A. D. 1859, until paid, which amount in favor of Potter, Hitchcock & Co., was recovered before George S. Mathews against Geo. R. Dean, on the 21st day of December, A. D. 1858, in certain action of debt, also costs of suit, together with all accruing costs, and make your legal service and due return of this writ to me at my office in said county, within thirty days from this date.

"Given under my hand this 20th day of January, A. D. 1859.

EDWD. TYRRELL, *Justice of the Peace.*"

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This was objected to upon the ground that it was void upon its face. The objection was sustained and the execution rejected. Plaintiff then offered to prove by parol, that said Matthews was an acting justice at the time of the rendition of the judgment, and that he did render the same. This was objected to, and the objection sustained. And there being no further testimony, judgment was rendered for the defendants, and the plaintiff appeals.

John E. Burke for the appellant.

The failure of the justice who issued the execution to annex "J. P." or "Justice of the Peace," to the name of his predecessor, was merely a clerical mistake or omission, and did not render the execution void. *Sheldon v. Van Buskirk*, 2 Com., 473; *Elliott v. Cronk's Administrator*, 13 Wend., 35; *Irden v. Potterfield*, 19 Geo., 139; *Kellogg ex parte*, 6 Vt., 511; *Klessendorf v. Ford*, 3 B. Monr., 471; 3 G. Greene, 489; 19 Georgia, 139. Formal defects not rendering an execution void, cannot be taken advantage of by an officer to shield himself from the consequences of neglect of duty. *Chase v. The Township of Plymouth*, 20 Vt., 469. The substance of the statute was not complied with, and the execution sufficiently identified the judgment to render certain the authority upon which it issued. *Sprott v. Reid*, 3 G. Greene, 489.

J. C. Wright and *L. L. Ainsworth* for the appellee.

WRIGHT, J.—The writ was held void, for the reason that it did not "show that it was issued upon a judgment rendered by an officer." And this ruling we think was erroneous. The failure to attach the words "Justice of the Peace," or the letters "J. P." to the name of the person rendering the judgment, would not have the effect of rendering the writ absolutely void in the hands of the constable, so as to

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enable him to protect himself for his improper or negligent treatment of property seized or levied upon by virtue thereof. The defendant in the execution might claim that it was irregular and voidable, perhaps, but not void. If not void as to the defendant, the defect certainly could not avail the constable, nor his sureties, after he had acted upon it as a valid writ, and suffered property seized thereunder to perish because of his abuse of the same.

It was the duty of Matthews, upon the expiration of his term of office, to deposit with his successor his official dockets and papers, to be kept as public records. His successor was invested with power to issue executions on judgments found unsatisfied in the dockets, thus coming into his hands, in the same manner and with like effect as the justice rendering the same. (Code, 1851, §§ 2377-79, and 2387.) And though it would be more strictly proper and regular that the official character of the justice or person rendering the judgment should be expressly stated, yet this clerical omission will not vitiate nor make void the writ, for its basis, purpose and object sufficiently appear, and especially so, as the justice issuing it is a sworn public officer, and some presumptions may be legitimately indulged in, where he is in the discharge of a duty enjoined by law. Not only so, but the execution so describes and identifies the judgment as to render certain the authority upon which it was issued, and was therefore sufficient to invest the officer with power to levy and sell. If so, it would not be void. (*Sprott v. Reed*, 3 G. Greene, 489; *Sheldon v. Van Buskirk*, 2 Comstock, 473; *Elliott v. Cronk's Administrator*, 13 Wend., 85.)

Again, it may be questioned whether, under the state of the pleadings, the objection, if good upon general principles, could avail. After admitting the judgment, execution and levy, an answer was filed denying the same matters. There was no withdrawal of the first, no substitution, no leave to

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file an additional or further answer, nothing indicating that the several answers were to be treated as one, but the cause was tried upon the issues thus made up, though clearly conflicting and inconsistent. Under such circumstances, we regard it very doubtful whether defendants were not estopped from denying the authority for issuing the writ. But holding as we do above, it is not necessary to pass upon this view of the case.

Reversed.

STODDARD V. FORBES *et al.*

1. **MORTGAGE REDEMPTION.** There is no redemption of mortgaged property after sale in foreclosure; and in a decree of foreclosure no particular words cutting off the equity of redemption are necessary.
2. **REDEMPTION FROM JUDICIAL SALE.** A judgment debtor has the right to redeem property sold under execution, in all cases, except in the foreclosure of mortgages; and such right may be exercised by an assignee of such debtor to the same extent that it could be by the assignor.
3. **RECEIVING REDEMPTION MONEY.** While neither a mortgagor nor his assignee has the right to redeem mortgaged premises after sale in foreclosure, if the mortgagee or purchaser accepts money tendered for the purpose of redeeming, and executes a receipt therefor, specifying that it is for that purpose, he will be estopped from denying such right.
4. **SAME: EFFECT OF REDEMPTION.** A redemption of mortgaged premises after sale in foreclosure has the effect to restore the parties to the position which they occupied before the sale; the amount paid for the redemption being paid on the mortgage debt, and the mortgaged property remaining liable for any balance of such debt remaining unpaid.

Appeal from Louisa District Court.

FRIDAY, JUNE 6.

THE facts are stated in the opinion of the court.

Richman & Bro. for the appellant, cited 1 Hill. Mort.,

468; 2 Id., 165, note; *Berger v. Hister*, 6 Whart., 210; *Kimmel v. Williard*, 7 Doug., 217.

Bird & Sprague for the appellee.

BALDWIN, C. J.—The respondent, Drusilla Forbes, executed to the complainant her three promissory notes, payable in one, two and three years. To secure the payment of said notes at maturity, she executed a mortgage upon certain real estate. The first note was paid when it became due. The second being unpaid, the complainant brought his action, and obtained a decree of foreclosure, and all the lands described in the mortgage were sold by the sheriff under this decree, in satisfaction of the amount due on the second note. The property sold was purchased by the complainant, and a sheriff's deed made and delivered to the purchaser, in pursuance of the terms of the sale.

Subsequent to the sale, and delivery of the sheriff's deed to complainant, the respondents, Isett & Brewster, purchased the right, title and interest of the said Forbes in the premises thus mortgaged and sold, and received a deed therefor. Upon the day of the purchase from Mrs. Forbes, it being within one year after the sale by the sheriff, Isett & Brewster deposited with the clerk of the District Court of said county, a sufficient sum of money, for the purpose of redeeming the said lands sold by the sheriff, under the foreclosure. The complainant accepted of the money thus deposited with the clerk, and receipted upon the judgment docket therefor, in full redemption of the lands sold under the decree of foreclosure. The third note afterwards falling due, the complainant filed this petition, praying for a judgment thereon, and a foreclosure of the same mortgaged premises, making the respondents, Isett & Brewster, parties for the purpose of cutting off all their equities, &c. To this petition the respondents each plead the former foreclosure,

in bar of the present proceedings. To these answers a demurrer being filed and sustained, a decree of foreclosure was entered as prayed for. Respondents appeal.

It is claimed that the respondents' equity of redemption was not cut off by the first decree, as the court did not, in direct terms, in the decree so declare. It is therefore claimed that when Isett & Brewster purchased the interest of the respondent, Forbes, in the mortgaged premises, Mrs. Forbes still possessed an interest therein, an equity of redemption.

It has been held by this court, that where there is a foreclosure and sale, under a mortgage, there is no equity of redemption. See *Kramer v. Rebman*, 9 Iowa, 114; *Stoddard v. Hays et ux.*, 12 Id., 576; *Wagner v. Galyear et al.*, *infra*.

Our statute, by its express language, determines the rights of the parties to a mortgage. Whenever there is a failure upon the part of the mortgagor to pay, as stipulated, the mortgagee can bring his action of foreclosure. If he is entitled to a judgment, and an order of sale of the mortgaged premises, the law determines the effect of such judgment and sale. The equity of redemption is cut off by operation of law, and no particular words are required in the decree, declaring such to be the effect of the judgment of the court. The mortgagor has a right to redeem at any time after judgment, and before the sale. When the sale is made, and the deed delivered, such right no longer exists. Our statute recognizes the right of the judgment debtor to redeem from a judicial sale in all cases except where the property has been sold under an order of foreclosure. This right of redemption is given to the debtor, or other incumbrancer upon the property sold, and the rights of a defendant, in relation to redemption, are transferable, and the assignee has *the like power* to redeem. See § 1945 of the Code.

The assignees, Isett & Brewster, who are the transferees

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of Mrs. Forbes' equity of redemption can claim no greater rights by virtue of their purchase than were possessed by their grantor. By permitting the mortgage to be foreclosed, and the property sold, and the deed made, the complainant acquired all the right and title of the defendant, Mrs. Forbes, or her assignees, to said property.

The assignees, however, insisted upon their right to redeem from the sale made under the decree of complainant, and by the acceptance of the redemption money, and by specifying in his receipt that it was accepted for that express purpose, we think the complainant recognized the right of the defendants to redeem, notwithstanding the provisions of the statute denying such right.

If, however, it is conceded that Isett & Brewster did, by the consent of the mortgagees effect a redemption, the rights acquired thereby are the same as they would have been had they redeemed from an ordinary judicial sale, and before the right of the debtor to redeem had expired.

The effect of a redemption by the paying in of the money, (with interest and costs,) that the purchaser paid when the sale was made, is to place the parties just where they were before the sale was made, with the exception that the purchase money is to be applied in liquidation of the judgment. If the property sold for a sufficient sum to satisfy the judgment, the debt is canceled, and the rights of the parties are fully settled.

It is argued by counsel for appellant that by the foreclosure proceeding of complainant, the force of the mortgage was spent, that there had been a foreclosure and sale, that the complainant had once exhausted his remedy, and could not again acquire it.

This would perhaps be true, were it not for the effect which is given to the act of the parties in redeeming. The assignees can redeem only as the debtor could. The debtor could redeem only by paying in the purchase money.

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When this was paid in and accepted, it discharged the judgment, set aside, as it were, all the proceedings under the foreclosure, and placed the parties in the same position they were in prior to the commencement of the foreclosure proceeding, except that the debt was paid.

In the case of *Bradley and wife v. Snider et al.*, 14 Ills. 263, it was held that a lien upon mortgaged premises is not exhausted by a sale of them, and the holder of an equity of redemption, when he seeks to redeem these premises, must not only pay the sum for which they were sold, but the whole sum due on the mortgage.

Affirmed.

13 300
94 582

JOHNSON V. MONELL.

1. **WAIVER OF SERVICE OF NOTICE.** A waiver of service of notice, by an indorsement on the back thereof, signed and dated as required by § 2816 of the Revision of 1860, is equivalent to an acknowledgment of service, and confers upon the court jurisdiction.
2. **MORTGAGE: PURCHASER OF MORTGAGED PROPERTY.** The purchaser of mortgaged property is not, in the absence of a special contract, liable for the mortgage debt; and the mortgagee's remedy, so far as it affects the purchaser, is against the property and his equity of redemption.
3. **SAME: PARTY.** A mortgagor who has disposed of his interest in the mortgage premises is not a necessary party to a proceeding to foreclose the mortgage.

Appeal from Polk District Court.

SATURDAY, JUNE 7.

FORECLOSURE OF A MORTGAGE. The petition alleged that one James C. Carson, on the 20th day of June, 1856, executed the mortgage set out as an exhibit thereto, for the

purpose of securing the payment of two certain promissory notes; that on the 1st of October, 1856, Carson sold the land described in the mortgage, subject thereto, to Francis R. West; and that Francis R. West sold the same premises, subject to the mortgage, to the defendant John J. Monell.

The defendant indorsed on the back of the original notice, the following:

"I, John J. Monell, the within named defendant, do hereby waive service of notice, at Newburgh, county of Orange, State of New York, this 27th day of March, 1861.

"JOHN J. MONELL."

The defendant made default, and the court found that there was due the plaintiff the sum of three thousand, three hundred and thirty-three dollars and thirty-three cents, and decree that "the plaintiff have judgment for 'that sum;' that the defendant's equity of redemption in and to the 'mortgaged property' be forever barred and foreclosed; and that a special execution issue commanding the sheriff of Polk County to sell the above described real estate, for the purpose of satisfying the above decree," &c. The defendant appeals.

Finch & Clark for the appellant, contended :

1. That the service of notice did not give the court jurisdiction. 2. That judgment could not be rendered against Monell on a note executed by Carson. 3. That no decree could be entered without making Carson a party defendant.

Casady & Polk for the appellee, contended :

1. That the waiver of service of notice was equivalent to an acknowledgment of service. 2. That the decree affects appellant only as it bars his equity of redemption. 3. That the mortgagor, after a sale of the mortgaged

premises, is not a necessary party to a foreclosure proceeding. *Murray v. Cutlett*, 4 G. Greene, 108; and the authorities there cited; *Miller et al. v. Tipton et al.*, 6 Blackf., 238; *Comley and Wife v. Hendricks*, 8 Id., 189; 15 Ind., 185.

BALDWIN, C. J. — The first error assigned relates to the sufficiency of the service of the original notice. The plaintiff seeks the foreclosure of a mortgage upon certain real estate, executed by one Carson to the petitioner. Carson sold the mortgaged premises to one West, who afterwards sold the same to defendant. The land is within the jurisdiction of the court. The service of the notice was made beyond the limits of the state.

The defendant waived service of the notice, by an indorsement to this effect, made upon the back of the notice, and over his signature thereto. It is objected that such a waiver is not of itself evidence of service, that the court cannot determine from this alone whether such signature is genuine or otherwise, and that the law contemplates some additional evidence to show that such service was made. To this it may be answered that the record does show that the court heard evidence in reference to the sufficiency of service. What the evidence was we are not advised, but are to presume it was sufficient to justify the action of the court. But we do not think that any evidence except the acknowledgment itself is required. Section 2816 of the Revision provides that the notice may be served by taking an acknowledgment of the service indorsed upon the notice, dated and signed by the defendant. A waiver of service is equivalent to an acknowledgment of service, and the manner in which the acknowledgment is taken is pointed out by the language of the section by the defendant's dating and signing the same. If it had been contemplated by the legislature that proof of the taking, &c., should be made,

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there would have been some language used to indicate such a design. The signature to the waiver, dated, &c., is *prima facie* evidence of service. It is to be regarded by the court in the same light as the signature to a pleading.

The second point made by the counsel for appellant is, that the court erred in rendering a personal judgment against defendant, without having first sought to enforce the collection of the debt as against Carson, the original maker of the note and mortgage; and that Carson should have been made a party defendant to this proceeding. The purchaser of mortgaged premises does not become personally liable for the debt secured, unless there is a special contract to pay such incumbrance. There is no averment to this effect in the petition of complainant, and the order of the court directing a judgment to be entered in this case is erroneous. The complainant's remedy, so far as it affects the defendant, is against the property purchased—the equity of redemption. Upon the authority of *Murray v. Callett*, 4 G. Greene, 108, and the cases there cited, Carson having disposed of his equity of redemption, was not necessarily a proper party to the foreclosure. The defendant, as a purchaser of the mortgaged premises, is not liable to the plaintiff personally, but his equity of redemption can be foreclosed, and to this extent, only, is the decree of the court correct.

That portion of the order of the court which directs a judgment against defendant is set aside, and a decree of foreclosure directed to be entered in this court. As thus modified, the judgment is affirmed, at the costs of the appellee.

Semple v. Lee.

SEMPLÉ V. LEE *et al.*

1. SERVICE OF NOTICE: WHO MAY COMPLAIN WHEN DEFECTIVE. A junior incumbrancer who is a co-defendant with the mortgagor in a foreclosure proceeding, cannot on appeal complain of a judgment against such mortgagor, on the ground that it was rendered without sufficient service of notice.
2. PARTIES IN FORECLOSURE. The purchasers of mortgaged property are proper parties to a proceeding to foreclose the mortgage, and the mortgagor who has disposed of his equity of redemption is not a necessary party.
3. PRESUMPTIONS IN FAVOR OF THE DECREE BELOW. When the record in a chancery cause does not disclose the evidence upon which the decree below was rendered, the appellate court will presume that it was sufficient to sustain the decree.

Appeal from Henry District Court.

SATURDAY, JUNE 7.

THE facts are sufficiently stated in the opinion of the court.

Woolson & McFarland for the appellants.

Francis Semple for the appellee.

BALDWIN, C. J. — Alexander Lee gave to one Rudd his promissory note, and secured the same by a mortgage upon certain real estate, duly executed by himself and wife. The land thus mortgaged was afterwards sold by Lee and wife to Gaylord, Ferguson & Co. Subsequently the appellants, Barclay, Ogg & Swan, became the owners of said premises. The note secured by the mortgage was assigned to plaintiff, who brings his bill of foreclosure against the mortgagors, and subsequent purchasers of said premises. It is averred that each of said firms purchased said premises with a full knowledge of the mortgage lien, and that they assumed to pay said incumbrance when due. The defendants were personally served with notice, except Lee

Semple v. Lee.

and wife, who were non-residents, and were served by publication of notice. A judgment and decree of foreclosure being rendered against all of the defendants, Barclay, Ogg & Swan, appeal.

It is first claimed that the judgment against Lee and wife was erroneous, as the service was not complete, the complainant having failed to show that he mailed to them a copy of the notice and petition. It is a sufficient answer to this, that Lee and wife do not complain. As between the complainant and mortgagors the judgment is good, until reversed or set aside. If Lee and wife do not complain, no other person or party can do so for them without their assent.

It is next claimed that the court erred in rendering a personal judgment against the appellants, as there was no evidence introduced to show that they had ever assumed to pay the mortgage lien, and that there was no promise in writing, by them, to pay the notes therein secured. Upon the authority of *Murray v. Catlett*, 4 G. Green, 108, and the cases there cited, and followed by this court, in the case of *Johnson v. Monell*, *ante*, the appellants, as purchasers of the mortgaged premises, were proper parties to the foreclosure, and the mortgagors were not necessary parties when they had previously disposed of their equity of redemption.

In the case of *Johnson v. Monell*, *ante*, it was held that the court could not render a personal judgment against the vendee of the mortgaged premises, as there was no averment that he had assumed to pay the mortgage debt. The complainant in this cause avers that each of said purchasers assumed and agreed to pay, at maturity, the full amount of the incumbrance on said land. The appellants were defaulted, and what proof was introduced to sustain the bill, the record does not show. It is presumed that there was enough to support the averment, that the appellants

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had agreed to pay off the mortgage, or the court would not have rendered the judgment it did.

There are several other questions raised by the appellants' assignment of error, but as they are based upon the evidence which is not before us, we cannot consider them.

Affirmed.

WALKUP v. ZEHRING.

1. **PLEADINGS: MULTIFARIOUSNESS.** A bill is not multifarious when it joins a good cause of complaint, growing out of the same transaction, where the defendants are all interested in the same claim of right, and when the relief asked in relation to each is of the same general character.
2. **SAME: EXHIBITS.** In a proceeding to set aside a sheriff's sale of real estate, on the ground that it had been conveyed by, and did not belong to, the judgment debtor at the time of the sale, the execution and the sheriff's deed are not necessarily exhibits.

Appeal from Tama District Court.

SATURDAY, JUNE 7.

IN EQUITY. The bill in this case avers, that one John Zehring was the owner in fee of the southeast quarter of northwest quarter, section 3, Tp. 83, R. 15; that he sold the same to one Staley, but by mistake described it in the deed as the southwest quarter of the northwest quarter; that Staley sold to Boring, who sold to complainant, each deed containing the same mis-description; that one Foxworthy obtained a judgment against Zehring; that an execution issued, and thereunder the southeast quarter of northwest quarter was sold to Allen; that Foxworthy and Allen, before the date of said judgment, had notice of these

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several mistakes, and of the rights of complainant in the premises. The prayer of the bill is to correct these mistakes, and set aside the sheriff's sale and deed. Zehring, Staley, Boring, Foxworthy and Allen, are made parties. A demurrer to the bill was sustained, and complainant appeals.

Smyth, Young & Smyth for the appellant.

I. L. Allen for the appellee.

WRIGHT, J. — The demurrer was improperly sustained.

1. The bill is not subject to the objection of multifariousness. It does not unite several distinct complaints against several persons, having no common interest in the matters stated, in such a sense as to bring it within the rule contended for by appellees. The purpose of the bill, and the actual facts, are very different from those arising and discussed in *Gammel v. Young*, 3 Iowa, 297. There, the proceedings were in dower, and Wynkoop's title, under the sale, were independent of the question of lien, and proper parties as to one, would not be as to the other. Here the complainant claims under one title. There is but one chain, which he states is defective because of a mistake. This he seeks to correct, and to remove the cloud upon his title, caused by the proceedings under the judgment and sheriff's sale. He could have joined the several preceding grantees (and grantors) with him, or, at his option, make them respondents. They may be interested in favoring the remedy sought, or, it may be, in resisting it. If there was no mistake, as claimed, they would apparently be interested in resisting the complainant's bill. And this is the question to be determined. We are clearly of the opinion that the general rule applies, that a bill is not multifarious when it joins a good cause of complaint, growing out of the same transaction, where the defendants are all inte-

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rested in the same claim of right, and where the relief asked, in relation to each, is of the same general character. (Story's Eq. Pl., §§ 284, 530; *Powell v. Spaulding*, 3 G. Greene, 448; *Pierson v. David*, 1 Iowa, 23.)

2. It was not necessary to attach a copy of the execution and sheriff's deed. These were no part of the basis of the complainant's bill, within the sense of the statute requiring copies of the instruments sued on. *Dorcey v. Patterson*, 7 Iowa, 421.

Reversed.

ALVERSON V. BELL

1. OBJECTIONS TO DEPOSITIONS IN APPELLATE COURT. An objection to a deposition, other than for incompetency or irrelevancy, will not be considered by the appellate court when it was not made before the deposition was offered in evidence in the court below.

Appeal from Benton District Court.

SATURDAY, JUNE 7.

WHILE this cause was pending before the justice, the deposition of one Fehr was taken by defendant, and used on the trial without objection. On appeal, the justice returned the deposition with his transcript and the other papers in the cause. Plaintiff then, for the first time, moved to suppress the deposition, which motion was sustained. Defendant appeals, and assigns this ruling as error.

Murphy & McCollough for the appellant.

H. M. Martin for the appellee.

WRIGHT, J.—The only provision of the statute bearing directly upon this question, is § 2466, (Rev., 4093,) which declares that: "Depositions taken to be used in a justice's court, shall be transferred to the District Court if the case be appealed, and may be used on the trial there in the same manner as if taken regularly after the case was in the District Court." The general provisions of the statute are, that in case of appeal, the justice shall file in the District Court, with his transcript, all the original papers relating to the suit; and that such a case is for trial upon its merits, and for no other purpose. (§§ 2336, 2343.)

These sections do not assist much in the determination of the questions here involved, but we think they are in harmony with the principle which ought to and must govern, and that is, that exceptions, (other than for incompetency and irrelevancy,) must be made before the deposition is offered in the justice's court. In this case, the objection was to the certificate of the officer taking the deposition. The cause was tried in the inferior court on its merits. The deposition was used without objection, and after this, on the trial in the District Court, it seems to us to be like any other paper filed in the cause. As the party could not then object for the first time, to the sufficiency of the notice, the service, the petition or other pleading, neither can he for what may be styled a formal defect in a deposition. It is not unlike a case where there has been a trial, and a failure to obtain a verdict. A deposition then read, cannot afterwards be excepted to for such formal defects. A party may waive his objections; and this he does by permitting the evidence thus taken to go to the jury. Upon principle, authority, and the plainest dictates of justice, these objections should be made in time to enable the party to supply the evidence, if the deposition should be suppressed. The objecting party should not be allowed to remain silent, and permit a deposition to be

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read and remain on file, term after term, and then, on the eve of the trial, file his exceptions, and compel his adversary to a continuance of the cause, or go to trial without the benefit of such testimony.

Reversed.

LEVERSEE V. REYNOLDS.

1. JURISDICTION OF JUSTICES IN ATTACHMENT. The jurisdiction of a Justice of the Peace, in attachment, is not limited to the township in which the defendant resides, or in which the property sought to be attached may be found, but extends through the county. Revision of 1860, § 3853.
2. RULE OF CONSTRUCTION. Words in a Statute will not be construed as mere surplusage, if a construction can be legitimately found, which will give force to and preserve the entire Statute.

Appeal from Blackhawk District Court.

MONDAY, JUNE 9.

THIS action was commenced by attachment before a justice of the peace, of the township of East Waterloo, in Blackhawk county, and property attached, and defendant served with notice, in the township of Mount Vernon, in the same county, the latter being the township of his residence.

On a writ of error, the District Court ruled that the justice had no jurisdiction, from which ruling plaintiff appeals.

J. B. Powers and *S. B. Van Buskirk* for the appellant.

L. Chapman, for the appellee.

13	310
137	351

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WRIGHT, J.—The Revision provides that the jurisdiction of justices, when not specially restricted, shall be co-extensive with their respective counties. Suits may be brought in all cases, in the township where the defendant, or any one of several, resides. They may also be brought in any other township, if actual service is made therein. (§§ 3849-51-2.) And then § 3853 provides, that: "Actions of replevin and suits commenced by attachment, may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein, within the county."

This section is in substance, but a reprint of § 2265 of the Code of 1851, and § 3, chap. 93, Laws of 1853, p. 150. The first conferred jurisdiction, where any portion of the property was found in actions of replevin, and suits commenced by attachment. The latter provides that in such cases, justices should have jurisdiction co-extensive with the county. In the light of this legislation, and giving to the language of the Revision a fair and natural construction, we are of the opinion that the justice had jurisdiction in this case, and that the court below erred in holding otherwise. To hold that the jurisdiction is limited to the township of defendant's residence, or where the property may be found, would involve the necessity of rejecting, as unmeaning and surplusage, a portion of the language of the statute. For certainly, as thus construed, the words "and justices shall have jurisdiction therein, (that is in such cases,) within the county," would be entirely without meaning. This is never allowed, if a construction can be legitimately found, which will give force to and preserve all the words of the statute.

The judgment is reversed and cause remanded.

PFANTZ v. CULVER & Co. *et al.*

1. **ADMISSION OF IMPROPER EVIDENCE.** The Supreme Court will not reverse the judgment of the court below upon the ground that improper evidence offered by appellee was admitted, when it is shown by the record that the appellee was entitled to judgment upon the pleadings.
2. **ALLEGATIONS TAKEN AS TRUE.** When a defendant makes an appearance in an action, but makes no answer nor excuse therefor, the allegations of the petition will be taken as true.

Appeal from Linn District Court.

MONDAY, JUNE 9.

THIS action was commenced before a justice of the peace upon the following instrument :

"Chicago, May 13, 1861.

"**HOFFMAN & GELPCKE :**

"Pay to Robert Maxwell or order, Fifty-four & $\frac{1}{10}$ Dollars.

CULVER & Co."

Indorsed, "ROBERT MAXWELL."

The drawers and payees were made defendants, but answered not. Maxwell appealed, and on the trial in District Court, plaintiff offered in evidence the draft and certificate of protest, and upon this evidence, and this alone, judgment was rendered for plaintiff, and defendant appeals.

Thompson & Corbett for the appellant.

Smyth, Young & Smyth for the appellee.

WRIGHT, J. — The rejection of the testimony, objected to by defendants, and admitted in the court below, would not avail them, for the plaintiff is entitled to judgment upon the averments contained in his petition, which stand undenied. If, therefore, the testimony was improperly admitted,

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(and such is our opinion,) it is an error without prejudice. For if the cause, for this error, should be reversed and remanded, defendants are in default, and in no condition to controvert the allegations of the petition, which are clearly sufficient to entitle the plaintiff to judgment. Defendants were in court, made an appearance, but made no answer, nor excuse therefor.

The judgment must, therefore, stand

Affirmed.

 13 313
86 288

MCCRANEY'S EXECUTRIX v. GRIFFIN *et al.*

1. **CONSTRUCTION OF CONTRACTS.** All parts of a contract are to be weighed and considered in giving it a construction. The court in construing a contract should arrive at the intention of the parties by looking at the language employed, the purpose in view, and all the circumstances attending the contract.
2. **CONSTRUCTION OF BOND FOR CONVEYANCE OF REAL ESTATE.** A bond for the conveyance of real estate stated the terms and conditions substantially as follows: 1. That the vendees had made the vendor certain notes, for different sums and maturing at different dates, all bearing ten per cent interest; that accruing on two of them to be paid annually in advance. 2. That they had paid him the sum of \$764, the receipt of which is acknowledged. 3. Vendees were to pay all taxes and charges that might accrue against the lots. 4. The vendor undertook, if the said notes and interest thereon should be paid on or before the time they may respectively mature, and if all the taxes should be paid, whenever called upon afterwards to convey, by deed of general warranty, the property described; but if the said notes and interest and taxes accruing were not paid, then the contract was to be void, and the vendor reserved the right to re-enter upon said premises. 5. "And I do further agree, upon payment to me of two thousand dollars to make a deed to lot number three (3) and upon payment of five hundred dollars for each lot I agree to make a deed to either or any of lots one, two, four and five, (1, 2, 4 and 5,) and upon the

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payment of \$290.07, for each lot, I agree to make a deed of either or any of the remaining lots above described to" said grantees "or their assigns and at their own expense." It was held :

1. That after the payment of any of the sums named in the last clause or stipulation of the contract, the vendees or their assignees might elect to take the proper specific lot or lots ; and that after such election and notice thereof to the vendor he would be bound to convey ; but that he would not be in default by mere payment without an election and notice.

2. That the sum paid when the contract was entered into should be estimated with those afterward paid in determining whether any one of the several amounts upon the payment of which the vendee was entitled to a conveyance, had actually been paid.

3. That the vendee having paid in the aggregate more than the sum of \$2,000, but having failed to notify the vendor of his election to take a conveyance of lot three (3) before suit brought, was entitled to a conveyance upon the payment of the costs, and the taxes and charges thereon.

Appeal from Dubuque District Court.

THURSDAY, JUNE 10.

IN November, 1854, Thomas McCraney sold to Griffin and Hawthorne lots one, two, three, four, five, and thirty-three other lots in said vendor's additions to the city of Dubuque. On the 5th of January, 1855, he executed to these parties a bond, stating the terms and conditions of this sale, substantially as follows : *First.* That the vendees had made to him certain notes—(1), for \$1,184.87, due in one year—(2), for \$7,106.25, in ten years—(3), for \$3,250, in ten years, all bearing date November 7, 1854—(4), for \$764, in thirty days, of date January 5, 1855 ; all of said notes bearing ten per cent, the interest on the second and third to be paid annually in advance. *Second.* That they had paid him \$764, the receipt of which is acknowledged. *Third.* Vendees were to pay all taxes and charges that might accrue against the lots. *Fourth.* The vendor undertook, if the said notes, and the interest thereon, should

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be paid on or before the time they respectively matured, and if all the taxes should be paid; *whenever called upon afterwards* to convey, by deed of general warranty, the lots above referred to. But if the said notes, and the interest and taxes accruing, were not paid, then the contract was to be void, and the vendor reserved the right to reënter upon said premises. *Fifth.* In conclusion, there is this stipulation: "And I do further agree, upon payment to me, of two thousand dollars, to make a deed to lot No. three (3), and upon payment of \$500, for each lot, I agree to make a deed of either or any of lots one, two, four and five (1, 2, 4, 5); and upon payment of \$290.07 for each lot, I agree to make a deed of either or any of the remaining lots above described to said Hawthorne and Griffin, or to their assigns, and at their expense."

Hawthorne sold his interest in this contract to Jackman & Gilman. By proceedings in partition between Griffin, Jackman & Gilman, to which Hawthorne was a party, there was allotted to Griffin lot one, and twenty other lots described in said contract, and to said Jackman & Gilman those remaining, including lot three. This was in 1857.

In May, 1860, the complainant, as the executrix of the estate of Thomas McCraney, filed this bill, averring the non-payment of the note, the interest thereon, and taxes—and asking a foreclosure. After, answers were filed, a cross bill by Gilman & Jackman, and answers thereto—the cause was referred to B. W. Poor, Esq., who found and reported:

1. That there had been paid on the principal sum as follows: On or about Nov. 7, 1854, being the cash payment at the time of said purchase \$764
 About Feb. 5, 1855, the note at 80 days, ... 764
 About Nov. 5, 1856, the note due in one
 year, 1,184 37
\$2,712 37

2. And that the interest was paid on the notes for \$7, 106.25 and \$3,250, to Nov. 7, 1856.

3. That plaintiff was entitled to a judgment for \$6,120.45, being the amount of interest due to Nov. 4, 1861, and taxes paid by her to protect said property.

4. That under the pleadings, and by virtue of the last clause in the contract, Gilman & Jackman were entitled to a deed of lot three, as more than \$2,000 of the principal sum had been paid.

5. That a demand of the deed was not necessary.

6. That a decree of foreclosure should be rendered against all the other lots (except lot three) in favor of complainant.

Other facts were also found, and other legal conclusions stated, but as they are not controverted, they need not now be recited.

Exceptions were taken to the report, by complainant, which were overruled, and a decree entered in accordance with the findings of the referee. Complainant appeals.

Wiltse & Blatchley for the appellant.

C. J. Hawthorne and Burt, Angell & Lyon for the appellee.

WRIGHT, J. —The points in controversy in this case involve a construction of the agreement of January 5, 1855, and especially the last clause thereof. Two questions arise: *First*. Was a demand necessary to entitle respondents to a deed of lot three. *Second*. In computing the amount paid upon the principal sum, to entitle them to such deed, was it proper to include the \$764 paid before the execution of the bond, styled, in the agreement, the "hand money."

It is familiar law that all parts of the contract are to be weighed and considered in giving it a construction. Equally

familiar is the rule that the court shall place itself, as nearly as practicable, in the situation of the parties, and arrive at their true intention by looking at the language employed, the purpose in view, and all the circumstances attending the contract.

In this case there is an express provision that before the vendor, (after all the purchase money is paid, with the taxes to accrue,) would be in default, he shall "be called upon afterwards" to convey. A failure to make this demand would not release him from his obligation, but as he would not be in default, if the vendees had in all other respects complied with their undertaking, they would be entitled to a performance, at their own costs. This is the view of the contract, when looking to the language used, prior to the concluding clause, and upon the hypothesis there contemplated, that the *whole* purchase money and taxes should be paid and kept up. After this, however, there is a further agreement, which binds the vendor and gives to the vendees rights, in a manner and to an extent not before specified. Taking all three provisions together, what is the true construction.

In the first place, our opinion is, that the "further" clause was inserted for the benefit and convenience of the vendees. Without this, they were bound by the strict terms of the agreement to pay the entire consideration, before they could compel a conveyance of either of the lots. Such property, however, being the legitimate object of trade and speculation, as the greater part of the principal sum was not to be paid for ten years, and as by the possible advance in the value, in the meantime, of each or some of the tracts, they might, by disposing of the same, raise means to meet their agreement, this further agreement was entered into to enable them to accomplish their purpose. But suppose they paid \$500, \$1,000, or 2,000, or more, were they entitled, without more, to a deed to some specific

lot or lots? In other words, until the vendor was notified what lots they desired should be conveyed, would he be in default for not conveying? Our construction of the contract is, that while after such sufficient payment they might elect, and after such election, and notice thereof to the vendor, he would be bound to convey; he would not be in default by the mere payment, without an election and notice.

This conclusion receives much support, in the second place, from several considerations, which may be briefly noticed. And *first*, it will be seen that the vendees were to bear and pay the expense of such contemplated conveyances. If so, it is a fair and natural construction that they were expected to have prepared, and present for execution, the desired conveyance. Not, be it understood, that if they demanded a conveyance, the vendor could excuse himself because the vendees did not prepare and present the deed; but this clause or requirement tends to show that they were to be the active, and the vendor, to some extent, the passive party in the execution of the agreement. And this thought is in harmony with the prior provision that the vendor was to make a deed when called upon.

Again, by the "further" agreement, the vendor could not know what lot was to be conveyed, until demanded. By paying \$500, for instance, the vendees were not restricted to claiming a deed to one of the lots numbered one, two, four and five, but at their election, they could require a conveyance of one of those estimated as worth \$290.07. So, when they paid \$2,000, they might exact a deed for either or all of said four lots, valued at \$500 each, or they might take lot No. 3. In a word, it seems to us that the parties, after reducing their contract to writing in the usual form, then, in view of the great number of lots, the difference in their respective values, the length of time the contract had to run, and other considerations, such as the

convenience of the vendees before adverted to, affixed a schedule value upon each, and when sufficient should be paid to cover any one, a deed could be required, instead of waiting until the whole amount was paid, and the party entitled to a conveyance for all. It does not mean that just \$2,000 shall be paid at one time to entitle the party to lot three. But when payments have been made which, in the aggregate, reach that sum, the vendee might demand lot three, the four valued at \$500 each, or so many of those of lower value as would be thus paid for, or, as far as practicable, some of each. That lot three is first named in this concluding clause, is of but little importance. The obligation to convey this is no more imperative than any other. They all stand alike, and not until the vendor was notified what particular lot or lots he was desired to convey, would he be in default.

Respondents have, however, by their cross-bill, elected to take lot three. This they are entitled to, paying costs, if they have paid sufficient, according to the terms of the contract, to entitle them to it. And this brings us to the *second* question, whether the \$764, or the "hand money," shall be estimated in making up the \$2,000, which was to be paid before the deed could be demanded. And it seems to us that it should. This construction is certainly not in conflict with the language used. And while it is true that the words "upon the payment to me of \$2,000," would seem to imply a subsequent payment, yet there is a consideration that to our minds is of controlling significance. This contract was made, and all its terms agreed upon, in November, 1854. Then it was that the \$764 was paid. It was not reduced to writing, however, until in January, 1855. The notes for the greater part of the purchase-money had already been executed. This agreement, made in January afterwards, should be construed, in considering the question, as if made at the time of the execution of the

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notes. As thus understood, in view of the purpose and object of the parties in inserting the last clause, as before explained, we can see no good reason why vendees should not have the benefit of this payment, as well as those subsequently made. It forms certainly a part of the consideration. And then, if it was not intended to have been thus included, it seems to us that the matter would have been placed beyond all contingency by the use of the word "hereafter," in the second line of what is termed the "further agreement."

Upon the whole, we conclude that appellees are entitled to a deed to lot three, but that it is liable to all taxes and charges of every kind and description paid thereon by appellant, that these should be required to be paid, by a day named, and in default thereof, that it, with all the other property, should be sold to satisfy the amount found due the appellant by the court below, and that appellees should pay all costs.

The cause will, therefore, be remanded, with instructions to modify the decree accordingly. In all other respects, the decree below will stand affirmed.

CLARKE V. BANCROFT, BEAVER & Co. *et al.*

1. CONSTRUCTION OF MORTGAGE. The grantee of real estate, delivered to the grantor certain promissory notes executed by third parties, in part payment of the purchase money therefor, and agreed to deliver notes to pay the balance within two months, and executed a mortgage of the property conveyed, to the grantor, conditioned that if said purchase money, and interest at ten per cent, be paid by the payment of said notes at their face, and ten per cent interest after their transfer to said grantor, the obligation should be void, &c. *Held*, That the mortgage was a security for any balance of purchase money remaining unpaid after the proceeds arising from

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the collection of the notes transferred to the grantor had been applied thereon.

2. **WHEN SETTLEMENT AND DECREE ARE CONCLUSIVE.** A settlement between a mortgagor and mortgagee, and a decree thereon finding and establishing the sum due from one to the other, are conclusive, unless it is made to appear that such settlement and decree were obtained by fraud.
3. **SWORN PLEADING.** An answer under oath to a cross-bill demanding a sworn answer, so far as it is responsive, is equivalent to the evidence of a disinterested witness.
4. **PLEADING: CROSS-BILL.** Where a mortgagee is made a party defendant in a foreclosure proceeding, and by his cross-bill alleges that his mortgage lien is prior to that of complainants, the complaint may join issue thereon by proper allegations in the replication or answer to the cross-bill, notwithstanding he has made no allegations of priority of bills in the petition: and under an issue thus joined the complainant may introduce evidence to show that his mortgage was admitted to record prior to respondents'.
5. **MARSHALING SECURITIES.** While a court of equity will compel a creditor who has recourse to two funds for the satisfaction of his demand to exhaust that upon which he alone has a lien before resorting to the fund upon which another creditor has recourse; but it will not be done to the prejudice of the rights of either creditor.
6. **SAME: NOTICE.** The creditor having a lien upon but one fund to secure the payment of his demand should notify creditors having liens upon the same and other funds, before they have relinquished their control over such funds, that they will be required to exhaust them first.

Appeal from Henry District Court.

TUESDAY, JUNE 10.

THE facts are stated in the opinion of the court.

David Rorer for the appellant, contended that though complainant's mortgage was executed before the one under which respondents claim, yet it is not entitled to priority, for it is not alleged in the petition, or any where proved, to have been on record, or within the knowledge of the respondents, or those under whom they claim. The complainant avers, in his replication, that it was recorded but does not state when. The complainant cannot make a case

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on his replication. He must recover *allegata et probata* on the statements of his bill. *Piatt v. Vathier et al.*, 9 Pet., 405; 3 Greenl. Ev., 355; *Langdon et al., Executors of Sewal, v. Goddard et al.*, 2 Story C. C. R., 267; *Lingaw v. Henderson*, 1 Bland, 249, 255; *Sheppard v. Sheppard*, 6 Conn., 37; *Booth v. Booth*, 3 Litt., 57; *Bank of the United States v. Shutz*, 3 How., 62; *Anthony v. Lefturch*, 3 Rand., 263; *Jackson's Assignee v. Cartright*, 5 Mumf., 314. Complainant was a trustee as to the fund consisting of the notes. He could make no contract to divert these funds, nor could he administer them himself, but should have been compelled to bring them into court. *Piatt v. St. Clair's Heirs*, Wright's Ohio R., 261; *Wright v. Dougherty*, Martin & Y. (Tenn.), 309; *Gross v. Lester*, 1 Wis., 48; 1 Hill. Mort., 296, § 77; *King v. McVickar*, 3 Sand. Ch., 192; 1 Story Eq. Jur., §§ 558, 559; *The Bank of Muskingum v. Carpenter's Administrators*, Wright's Ohio Reports, 729. Equity will subrogate respondents to complainant's rights in the land, after exhausting the notes, or will require complainant to resort first to the notes, and require the court to administer the fund. 1 Hill. Mort., 318, § 46; Id., 308, §§ 23, 24; *Everton v. Booth*, 19 John., 493; *King v. McVickar*, 3 Sandf. Ch., 192.

R. L. B. Clarke, pro se, submitted an elaborate argument upon the evidence.

BALDWIN, C. J.—This was a proceeding to foreclose a mortgage executed by Ray and wife.

The premises mortgaged were purchased by Ray of complainant, and the mortgage in suit given in security for a portion of the purchase money. After the land was sold by the complainant, Ray sold the same to one Covert, receiving, in consideration therefor, the notes of Covert, secured by a mortgage on said premises. Bancroft, Beaver

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& Co. claim to have certain equities in said land, as the assignees of the Coovert notes and mortgage. Ray, when he purchased from the complainant, agreed to pay, in consideration therefor, the sum of \$11,533. In part payment of this sum, Ray transferred to complainant certain promissory notes executed by divers persons to said Ray, drawing ten per cent interest, amounting, in the aggregate, to \$7,063.99. For the balance of the purchase money, (excepting the sum of \$1,000 receipted for at the time the deed was delivered,) Ray gave to the complainant his obligation, in which he promised to deliver to the complainant, within two months, other notes sufficient to pay the balance of the purchase money. The condition of the mortgage by Ray and wife is, "that if said purchase money, and interest at ten per cent, be paid by the payment of said notes at their face, and ten per cent interest after transferred to said Clarke, then this obligation to be void." The complainant alleges that he has used due diligence, since the said notes were transferred to him, in order to collect the same, that his efforts to collect were unavailing, as the makers of nearly all of said notes were insolvent. The complainant alleges that after making every proper effort to collect said notes, he returned the same to said Ray. That the complainant and Ray had a settlement, after the uncollected notes were returned, and that there was due to complainant the sum of \$7,063.99, for which he now asks judgment, and a foreclosure of the mortgage given as security for the purchase money.

Bancroft, Beaver & Co. answered, and set up the sale from Ray to Coovert, the execution of the notes and mortgage from Coovert to Ray, and the assignment to defendants of said notes and mortgage, and claim that they took said notes before they had matured, and in ignorance of the complainant's lien. They also charge that complainant has received from said notes the full amount of the pur-

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chase money, that he received notes that have been unaccounted for, that complainant and Ray have colluded together to defraud the respondents, by diverting a large part of notes from going as payment to the complainant, and thereby reinstating the mortgage as against the land.

The defendants, Ray and wife, and Covert, failed to answer, and judgment and decree, as *pro confesso*, were entered up in favor of complainant for the amount claimed in the petition.

Respondents aver that this judgment and decree were obtained by fraud, and it is asked that they shall be set aside. The respondents further charge that the complainant was and is a trustee for Bancroft, Beaver & Co. for all amounts in his hands, more than sufficient to pay his debt, and they ask that the court should direct that complainant should first be required to apply the notes held as collateral, before proceeding against the land.

This answer is in the nature of a cross-bill, and in it certain interrogatories are propounded to Ray, with a request that he should make full answers thereto, under oath. The complainant is also called upon to answer, under oath, and to state fully the amount of the notes received, the amount collected thereon, &c. Ray and the complainant answer separately, stating the amount of the notes delivered under the contract, the amount collected, the settlement, the return of the unproductive notes, and each deny fully and unequivocally any attempt to defraud the respondents. Upon the issues thus made, and the evidence introduced, the court below dismissed the defendants' cross-bill, for want of equity.

It is first submitted that the notes assigned by Ray to the complainant were in payment of so much of the purchase money, that the mortgage was but a security for the fulfillment of the said Ray's agreement to deliver certain other notes in two months, &c. From a fair and reasonable construction of the language used, "that if said purchase

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money and interest is paid by the payment of said notes," we can but conclude that it was the design of the parties that the mortgage should be a security for the whole amount of the unpaid purchase money, and that the notes were assigned for the purpose of having the complainant collect them, and apply the proceeds to the payment of the unpaid purchase money.

It is next claimed that the note fund was not carefully dealt with by the complainant, and that, under the evidence, the complainant was not entitled to the amount found to be due upon the settlement between him and Ray. We think, in the first place, the settlement between these parties, and the judgment of the court thereon, is conclusive as to the amount due on the mortgage, unless it is made to appear that the settlement and the judgment and decree against Ray were obtained through fraud. This the respondents, by their pleadings and evidence, seek to do, but in this we think they signally fail.

Under the ruling of this court in the case of *Shepherd v. Ford*, 10 Iowa, 502, when a reply to a pleading is called for under oath, such pleading, when thus made, if responsive, shall be considered as evidence of equal weight with that of a disinterested witness. Each of the parties thus called upon to answer, state under oath, that the amount for which judgment was rendered was justly due to the complainant, and after a careful review of the voluminous record of evidence, we cannot find any evidence to overcome these answers.

It is true, as is claimed by counsel for appellant that the complainant fails to aver in his bill, that the mortgage of Ray and wife was made a matter of record prior to that of respondents, which it is now sought to subject to the prior lien of complainant. To this we answer, that upon the trial evidence was admitted without objection of respondents, to show that the Ray mortgage was first recorded, and

which fully establishes the fact that it was prior to that of Coover to Ray.

We are also of the opinion that the complainant's averment in his replication, that his mortgage was recorded prior to that under which the respondents claim, is sufficient to justify the admission of evidence to support the same. The respondents seek to enforce the rule that the complainant cannot make a case or supply a defect by his replication, but that he must recover *allegata et probata* on the statement of his bill. We will concede that the authorities cited show this to be the general rule, but deny its application to this case.

When the complainant made the respondents parties for the purpose of foreclosing any equities they had in the mortgaged premises, they, by their cross-bill, undertake to establish the fact that their lien is paramount by its priority of record. A new issue is raised, the respondents assume the affirmative, and to defend against this position, it is strictly proper to plead, and prove under such plea, anything that will legitimately controvert this position of respondents.

It is assumed that the complainant was the trustee of respondents, and should be made to account for the trust fund under his control, or that the complainant had two securities for his purchase-money, and that respondents having a lien upon one of the securities, (the real estate,) it was but equitable that the complainant should be compelled to exhaust the note fund first.

We do not think, from the terms of the mortgage, that this note fund was placed in the hands of complainant as a security for the purchase-money. The mortgage was the security, and the notes were assigned for the purpose of enabling the plaintiff to collect them, and when collected, the proceeds to be applied in liquidation of the purchase money. We will concede the rule in equity to be that

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where there exist two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund, but the other can come upon one only, that in such a case, a court of equity can exercise the authority to marshal the funds, and by this means enable the parties whose remedy at law is confined to one fund only, to receive due satisfaction. Courts of equity interfere in such cases, to prevent the power held by the party who controls the double fund from being made an instrument of caprice, injustice, or imposition. But, although this rule is so general, it is not to be understood without some qualification. It is never applied except where it can be done without injustice to the creditor.

The respondents fail to show that the complainant was notified at any time prior to the settlement with Ray, that they claimed that the note fund should first be exhausted. The complainant may have had notice of the subsequent mortgage, and that the respondents had a junior lien thereby, but, without any notice to the contrary, he had a right to presume that the lien created by the Ray mortgage was a sufficient security for the respondent's debt.

Affirmed.

13	327
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KIMMANS V. CHANDLER & LOCKHART.

1. ACTION FOR FALSE REPRESENTATIONS. A vendee cannot recover of the vendor for damages by reason of false representations, when it is not alleged or proved that the representations were known by the party making them to be false, or when it appears that the damages sustained are contingent and not actual.

Appeal from Polk District Court.

TUESDAY, JUNE 10.

THE facts are stated in the opinion of the court.

M. D. & W. H. McHenry for the appellant.

Casady & Polk for the appellee.

BALDWIN, C. J.—The defendants sold and assigned to plaintiffs, in consideration of \$280, a bond of the school fund commissioner for a deed to a certain tract of the school lands. Defendants, it is claimed, represented that the interest upon said bond had been paid annually, up to the time of said purchase by plaintiff. It appeared that the interest for the year 1858 had not been paid by defendants, although they had so represented, when they assigned the bond to plaintiff. This suit is to recover the interest for that year, which plaintiff claims is an incumbrance upon the land, and which he will have to pay before he can obtain the title thereto.

The cause was submitted to the court, which, upon the evidence, rendered a special finding, in substance as follows: That Lockhart agreed with and represented to the plaintiff that the sum of \$45, the interest for the year 1858, had been paid at the time of the trade. That plaintiff relied upon that statement, and entered into the contract believing that the interest for 1858 had been paid, and that the plaintiff used reasonable diligence in inquiring about the payment of the interest.

The court further found that said plaintiff had not paid said interest for 1858, to the county, but paid defendants that amount more than was due, according to their agreement, that the parties traded upon the understanding that said interest was paid; that the county still holds the notes against the defendants.

Upon this finding, judgment was rendered for plaintiff. A motion for a new trial, for the reason that the court erred in rendering judgment upon this finding, being overruled, defendants appeal.

The plaintiff does not seek to recover upon a breach of warranty, or for money paid by him at the request or for the use of the defendants. The claim is that defendants represented that the interest was paid, when in fact it was not paid, and that plaintiff will have to pay the same before he can procure his title.

It is not charged, nor does the court find, or the evidence show, that the defendants willfully made any false or fraudulent representations at the time of the sale. The substance of the averment is, and all the evidence shows, that the defendants were mistaken as to the fact that the interest for 1858 had been paid.

The plaintiff does not aver, nor does the court find, that the plaintiff has suffered by means of the defendants' representations. He has not as yet paid the money due the school fund, nor is it alleged that the defendants are insolvent, or unable to pay the same. Their note is yet with the proper officer, and the defendants are liable to an action thereon at any time.

The plaintiff's recovery in this case would not prevent the school fund from suing and recovering at any time for the same interest. The defendants should not be made twice liable for the same debt. With this view of the case, the court erred in its finding upon the evidence.

Reversed.

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 WILHELMI V. LEONARD *et al.*

1. **EVIDENCE: CROSS-EXAMINATION.** The court below did not err in refusing to permit a witness to be interrogated on cross-examination touching a conversation which was not either wholly or partially referred to in the direct examination.
2. **BILL ON EXCEPTIONS.** Under the Code of 1851, a general exception to the charge of the court to a jury entitled the party excepting to present to the appellate court, for review, any erroneous position in any portion of the charge.
3. **SAME.** The rule of the Code of 1851, as to bills of exceptions, governs in actions commenced before the Revision of 1860 took effect.
4. **MORTGAGE: MERGER.** When a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage and the mortgage debt are extinguished, unless it expressly or impliedly appears that the parties intended otherwise.
5. **SAME: PRO TANTO.** When a mortgagee takes a conveyance of a part of the mortgage property it operates to extinguish the mortgage debt *pro tanto*; and when there are two mortgages to secure the same debt, one of personal and one of real property, a purchase by the mortgagee, at a sale made under a senior incumbrance, of the realty does not discharge the mortgage of the personalty.
6. **EXECUTION OF NEW NOTE.** When the holder of one of several notes secured by mortgage delivered up the note to the mortgagor and maker, and took a new note for a different amount, payable at another date, and without any agreement that it should be secured by the mortgage, it was held that the holder lost his right to the security as against the holder of the other notes secured by the mortgage.
7. **ESTOPPEL.** A party cannot claim the benefit of a lien under a mortgage which he alleges has been discharged by merger, and was invalid as a fraud upon creditors.
8. **LIEN: JUDGMENT IN FORECLOSURE.** A judgment on a note secured by mortgage is a lien on the mortgaged property only from the date at which it was recovered when it does not order a foreclosure of the mortgage.
9. **CHATTEL MORTGAGE.** While the mere retention of mortgaged personal property by the mortgagor does not render the mortgage fraudulent, such retention under circumstances which show that it is for the benefit of the mortgagor alone, will justify a jury in finding that it is not *bona fide*.
10. **JURY: FRAUDULENT JUDGMENT.** The question whether in *point of fact* a judgment by confession was fraudulent is within the province of a jury. *Aliter* when the question is upon the sufficiency of the statement.

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Appeal from Scott District Court.

WEDNESDAY, JUNE 11.

THIS was an action by the plaintiff as mortgagee of one Nicholas Veiths, against the defendant, Leonard, as sheriff of Scott county, for unlawfully taking, and for the conversion of certain personal property, of which plaintiff alleges he was the lawful owner and of which he was entitled to the possession.

The plaintiff claims title by virtue of a chattel mortgage given to him on said property, dated the 11th day of November, 1857. This mortgage was given to secure the payment of a note made by Veiths to plaintiff for \$1,200. Other parties were the owners of certain notes signed by Veiths, and also secured by the same mortgage, which it is claimed, plaintiff had become liable for, and had assumed to pay. The mortgage was conditioned to pay all of the notes at maturity.

The defendants deny the allegations of the petition, and justify the taking, by averring that on the 28th day of September, 1859, the said Nicholas Veiths, the mortgagor, as aforesaid, confessed a judgment in favor of the defendant, Hans Hauman, for the sum of \$1,150, in the District Court of Scott County, upon which judgment an execution had issued, and under which the property claimed now as the property of plaintiff, being a part of the same specified in the mortgage, was levied upon by the defendant Leonard, as sheriff, and sold at public sale, and the proceeds applied to the payment of the confessed judgment.

Defendants claim that said property was, at the time of the levy, in the possession of, and owned by the mortgagor, Veiths, and that any title under which the plaintiff claimed was, as against Hauman, a creditor of Veiths, fraudulent and void.

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To this answer the plaintiff replied, and alleged that the judgment, execution and levy, under which the defendants justify, were void as against plaintiff; that, at the time of the levy, the plaintiff was the owner and in the possession of the goods named in the petition; that the judgment by confession was void, first, for the reason that there was no sworn statement of facts filed, out of which the indebtedness arose, and second, that the said judgment was obtained through fraud and by collusion of Nicholas Veiths, one Asmus Veiths, his brother, and the defendant Hauman; that such confession was made upon a note given by Nicholas to Asmus, and assigned to Hauman, and was without consideration, but was given for the purpose of procuring said judgment and levy, for the benefit of said Nicholas.

To this replication there was a rejoinder, and, upon the issues thus made, a trial was had, and, under the instruction of the court, there was a verdict for the plaintiff, and the defendant's appeal.

Grant & Smith for the appellant.

I. The taking of the quit-claim deed subsequent to the execution of the mortgages, and without proof or evidence of any new consideration passing between the parties to the conveyance, is *ipso facto* an extinguishment, not only of the mortgage or incumbrance upon the land, by reason of the fee being vested in the same person holding the incumbrance, but of the debt also. Whatever may have been the understood or implied intention, if it were not *expressed*, the implied intent or design will not be considered. *Ld. HARDWICKE in Chester v. Willis*, Ambler, 246; *James v. Morey*, 2 Cow., 246; 1 Hill. Mort., 329, § 62; *Jackson v. Tift*, 15 Geo., 557; *Gardener v. Astor*, 3 John. Ch., 53; *Starr v. Ellis*, 3 Id., 393.

II. The court erred in refusing to give the third and fourth instructions asked by the defendant.

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III. The court erred in refusing to give without modification the fifth and seventh instructions asked by the defendant, touching the validity of the chattel mortgage.

IV. The possession of personal property by the mortgagor in a chattel mortgage, for his own benefit, renders the mortgage fraudulent and void, as to other creditors; *Clow v. Woods*, 5 S. & R., 280; *Portland Bank v. Stubbs*, 6 Mass., 422; *Jewett v. Warren*, 12 Id., 300; *Many v. Killough*, 7 Yerger, 440; *Patten v. Smith*, 5 Conn., 196; *Swift v. Thompson*, 9 Id., 276; *Mills v. Camp*, 14 Id., 218; *Carpenter v. Mayor*, 5 Watts, 483; *Morris v. Hyde*, 8 Vt., 352; *Kendall v. Sampson*, 12 Id., 515; *Rogers v. Vail*, 16 Id., 327; *Wordell v. Smith*, 1 Camp., 332; *Powers v. Green*, 14 Ill., 386; *Twyne's Case*, 1 Smith's L. C., 47; *Gardner v. McEwen*, 19 N. Y. R., 123; *Freeman v. Ransom*, 5 Ohio State, 1; *Collins v. Myers*, 11 Id., 547; *Edgell v. Hart*, 5 Seld., 213; *Reed v. Eames*, 19 Ill., 594; *Kitchell v. Bralton*, 1 Scam., 300; *Edgell v. Hart*, 13 Barb., 380; *Harris v. Sumner*, 2 Pick., 129; *Bunklin v. Thompson*, 1 J. J. Marsh., 222; *Griswold v. Sheldon*, 4 Com., 581.

V. In law, a judgment by confession or otherwise, standing upon the record of a court, cannot be collaterally attached. *Gilman v. Hovey*, 26 Mo., 280; *Diehl v. Page et al.*, 2 Green's Ch., 147; *Shottenkirk v. Wheeler*, 3 John. Ch., 275; *De Reuner v. Cautellon*, 4 Id., 85; *Stephenson v. Rodney*, 5 Har., 150; *Whitwell v. Bardner*, 7 Cal., 54; *Kennedy v. Lowe*, 8 Iowa, 580; *Halbut v. Grant*, 4 Monr., 580; *McKimly v. Combs*, 1 Id., 106, 281; *Hendrick v. Robinson*, 2 John. Ch., 283; *Brinkerhoff v. Brown*, 4 Id., 671. It cannot be questioned by a creditor who has not reduced his claim to judgment. *Greenway v. Thomas*, 14 Ill., 271; *Green v. Conegay*, 4 Jones (N. C.), 66; *McDernett v. Strong*, 4 John. Ch., 687; *Wiggins v. Armstrong*, 2 Id., 144; *Lanton v. Levy*, 2 Ed. Ch., 197. It is conclusive until set aside. *Delaney v. Reade*, 4 Iowa, 292; *Rounds v. Hunt*, 24 Ill., 598.

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John N. Rogers and Dow & Brown for the appellee.

1. The exceptions to the judge's charges as given, and to his refusal to charge as requested, being general, (that is, to the whole charge, and to the refusal to give all the instructions asked,) and not pointing out any particular error complained of, are unavailing to bring any part of the charge or instructions complained of before this court for review. *Oliver v. Phelps*, 1 Zab. (N. J.), 597; *Haggart v. Morgan*, 1 Seld., 422; *Jones v. Osgood*, 2 Id., 233; *Hunt v. Maybe*, 3 Id., 266; *Hart v. The Rensselaer and Saratoga Railroad Company*, 4 Id., 37; *Caldwell v. Murphy*, 1 Kern., 416; *Dicker v. Matthews*, 2 Id., 313.

II. Where a mortgagee takes a quit-claim deed of the estate conveyed by his mortgage, the whole estate is vested in him, and the mortgage and the mortgage debt are extinguished unless the intention of the parties or the interest of the mortgagee intervene to prevent the merger. *James v. Morey*, 2 Cow., 246; *Gibson v. Orehere*, 3 Pick., 475; *Eaton v. Simonds*, 14 Id., 98; *Wickersham v. Reeves & Miller*, 1 Iowa, 413. When the mortgagee takes a conveyance of a part of the mortgaged property, the debt is discharged only *pro tanto*.

III. Appellant cannot claim under a mortgage, the validity of which he at the same time attacks.

IV. The possession of personal property mortgaged by the mortgagor, with a power to dispose of the same, does not of itself render the mortgage fraudulent. It may be shown in connection with other circumstances to prove actual fraud. *Kuhn v. Graves*, 9 Iowa, 303; *Torbert v. Hayden*, 10 Id.

V. It was competent for the plaintiff to show in evidence that the judgment by confession was *fraudulent in fact*. *Dutchess of Kingston's case*, 2 Smith's L. C., 508 (marg., 432); *Burnell v. Johnson*, 9 John., 243; *Crary v. Sprague*,

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12 Wend., 41; *The State v. Fife*, 2 Bailey, 337; *Atkinson v. Allen*, 11 Verm., 619.

VI. A failure to comply with the statute in the written statement filed under a judgment entered upon confession a nullity. *Kennedy v. Lowe and Creel*, 9 Iowa, 580; *Edgar v. Greer*, 10 Id., 279; S. C., 7 Id., 135; *Bernard & Co. v. Douglas & Watson*, 10 Id., 370; *Wilson v. Davis*, 1 Mich., 156; *Austin v. Grant*, Id., 490; *Beech v. Bottsford*, 1 Doug. (Mich.), 199; *Terry v. Filer*, 8 Wend., 569; *Durnham v. Waterman*, 17 N. Y., 9.

BALDWIN, C. J.—The first error assigned, is, that the court erred in sustaining an objection to a question asked the witness, Henry Ott, upon the cross-examination. The witness is asked whether plaintiff did not tell him at or about the time of the levy, that he knew the property levied on belonged to Veiths, and his creditors could hold it. The plaintiff objected to this question upon the ground that it was not proper upon cross examination, as no such conversation was referred to on the direct examination. The evidence is not before us in the shape of questions and answers, but is detailed in the record in a narrative form, the questions asked not given, but the substance of the answers only are stated. We are unable to determine from the record that the plaintiff, on the direct examination, called out any conversation in relation to what the plaintiff had said to said witness, about the property belonging to Veiths, and that his creditors could hold it. If, as maintained by counsel, the record showed a partial conversation upon this subject, elicited by the plaintiff, there is no question as to the right of the defendants to the whole of such conversation. From the record before us, we are not satisfied that the court erred in refusing to allow the question to be asked.

The instructions asked were each refused, except in so far as they were given in the charge of the court.

The second error assigned, is the refusal of the court to give certain instructions asked; and the third assignment, is that the court erred in its charge to the jury. These errors are argued by counsel in connection with each other, and we propose to follow this order, as far as we can.

The instructions asked are very lengthy, each being hypothecated upon a complicated statement of facts, as detailed by the testimony. The charge of the court is also very full, covering some twenty-two pages of the record.

As the instructions asked are marked refused, except so far as they are given in the charge of the court, it becomes necessary to consider those instructions asked, and those given, at the same time, in order to determine whether the court omitted to charge the jury correctly, upon the propositions asked by the defendants. We are necessarily confined to a mere statement of these propositions, as their extreme length would not admit of their being given by us in detail.

A preliminary question is raised by the counsel for the appellee, as to the form of the exceptions by the appellants to the charge of the court. It is objected that the exception is to the whole of the charge, and that it fails to point out specifically the particular portions that are claimed to be erroneous. Prior to the adoption of the Revision, this manner of excepting to the charge of the court, that is, by a general exception, was held to be sufficient, and would entitle the party thus excepting to present to this court for its review an erroneous position in any portion of the charge of the court. See *Eyser v. Weissgerber*, 2 Iowa, 463. This same preliminary question was presented for our consideration in the case of the *Gas Light and Coke Co. v. The City of Davenport*, ante. It was held, in that case, that under the provisions of §§ 3058 and 3059, of the Revi-

sion, a general exception to the charge of the court presented no question for our consideration, unless the whole of such charge was erroneous. This action, however, was commenced prior to the taking effect of the Revision, and under § 4172, either party can claim the right to have the cause determined under the law in force prior to the taking effect of the Revision.

From the pleadings and evidence, it appears that the plaintiff, to secure the debt due him from Nicholas Veiths, had taken not only the chattel mortgage, as above stated, but also a mortgage upon certain real estate. This land was encumbered by a prior deed of trust to one Darlington, executed by Veiths. The land was sold by Darlington, under the trust deed, and purchased by the plaintiff. Subsequent to this sale, Veiths quit-claimed all his right, title and interest in this land, to the plaintiff. Upon this state of facts, the defendants asked the court to instruct the jury, that if, when plaintiff took from Veiths a quit-claim deed of the land mortgaged by Veiths to him to secure the same debt secured by the chattel mortgage, under which plaintiff claims, and there was no agreement between them to keep the debt subsisting, the debt, and the lien of the chattel mortgage as incident thereto, were thereby extinguished.

The court, in its charge, upon this point instructed the jury, that taking the quit-claim deed satisfied the debt, if such was the intention of the parties, and that it would also presumptively satisfy it, if there was no intention to keep it alive and subsisting; that the intention of the parties was to be gathered, by the jury, from all the circumstances of the transaction, and the acts of the parties cotemporaneous with and subsequent to the making of the quit-claim deed; the interest of the parties; why the notes which evidenced the debt were not surrendered, &c., &c. That if the jury found that it was the intention of the

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parties that the taking of the quit-claim was in satisfaction of the plaintiff's debt, or that the plaintiff had no interest or intention to keep alive his mortgage when he received the quit-claim deed.

In the case of a mortgage upon real estate, we believe the rule to be that when a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished, and with it the mortgage debt, unless intention or interest in the mortgagee intervenes to prevent the merger. See *James v. Morey*, 2d Cow., 246. This must, however, depend upon the express or implied intention of the parties in whom the estates unite. See *Gibson v. Orehore*, 3 Pick., 475.

In the case of *Wickersham v. Reeves & Miller*, 1 Iowa, 413, in which it was claimed that the mortgage had been extinguished by a purchase of the legal title, ISBELL, J., in delivering the opinion of the court, says: "We think this view is not sustainable. The evidence clearly shows that this was not the intent of the parties to the sale of the legal title to petitioner, nor was it for the interest of the petitioner. We therefore conclude that this mortgage continues to exist as a lien on the premises."

The cases cited by the counsel for the appellants to show that the extinguishment of the debt follows from the merging of the title in the mortgage, suppose the existence of but the one mortgage to secure the debt, and these authorities lay down the rule, that when a mortgagee takes a conveyance of *part* of the mortgaged property, the debt is extinguished only *pro tanto*.

In this case there were two mortgages, one chattel, the other on realty, to secure the one debt. Conceding the rule to be that the merger of the title in the mortgagee extinguished the lien, and, as incident thereto, the debt, so far as it was secured by the land, the rule we do not think will hold good so far as it applies to the chattel mortgage,

at least without some evidence of an intention to that effect, either express or implied. The controversy, in this case, is about the property embraced in the chattel mortgage, and the mere fact that the mortgagee, who was compelled to purchase in the real estate described in his mortgage at a trustee's sale, to secure himself in his subsequent lien, and who, by such purchase, had already acquired a title from the trustee, accepts of a quit-claim for the same property from the mortgagor, without evidence of a relinquishment of the debt, should not deprive him of his lien upon the other property mortgaged to secure the same debt. But conceding the rule to be as claimed by the counsel of appellants, that the acceptance of the quit-claim is *prima facie* evidence of an intention to relinquish the debt, yet we think this intention can be shown to be otherwise, by the surrounding circumstances attending the transaction. This was a matter of which the jury could inquire, and the court, we think, very properly so charged.

It is next assumed that the court erred in the refusal to give the third and fourth instruction asked by the defendants. These instructions substantially involve the same proposition. The court, in its charge, omitted to refer to the positions herein stated, and the question is whether or not these instructions should have been given, as asked.

When the chattel mortgage was executed, one of the notes secured thereby was given to Asmus Veiths. Afterwards this note was given up to the maker, and a new note for a larger amount, founded in part on the same consideration was given to the same payee, Veiths. A suit was brought upon this note by Hauman, the assignee, and the maker confessed the amount due, and consented to a rendition of the judgment thereon. No claim is made by Hauman for a foreclosure of the chattel mortgage, or that he have a lien upon the property therein described, by virtue of the security, but an ordinary judgment is rendered for the amount of the

note and interest. It is claimed by the counsel of defendants, in the instructions refused, that a levy on the mortgaged property, under such judgment, will hold the property, as against the lien of the other creditors in the mortgage, because, under the mortgage, the note first maturing, would in the application of the proceeds of the property, be entitled to priority of payment. We think that when the payee of the note secured by the mortgage gave up the same, and took a new one, and different in amount, and without any agreement to show that it was still to be secured by the chattel mortgage, he lost his right to the security, as against other creditors. The defendant denies the validity of the mortgage; claims that it was merged by the quit-claim; that it was a fraud upon the rights of other creditors, and we think he cannot claim the benefit of lien under a mortgage which he thus attacks. Independent of these considerations, we think the court did not err in refusing these instructions, because the lien of the judgment of Hauman exists only from the date of the rendition of the confessed judgment. Granting that the new note was still secured by the chattel mortgage, the defendants did not ask for a foreclosure of this mortgage, but relied upon the judgment alone as their security for the debt.

The fifth and seventh instructions asked, were substantially given by the court. Although the counsel claimed that they were so modified as to take away from them their essence, yet we think the court, in its charge, presents to the jury the questions therein involved, in a clear and correct manner, and even favorable to defendants.

The eighth instruction asked, involves the position that the possession of personal property by the mortgagor, in a chattel mortgage, for his own benefit, renders the mortgage fraudulent and void, as against other creditors. It is admitted that this instruction was given, but modified.

The court directed the jury, that the remaining in possession, of the mortgagor, did not render the mortgage fraudulent, recognizing the rule, as settled by this court, in the case of *Kuhn v. Graves*, 9 Iowa, 308; and *Torbert v. Hayden*, 11 Iowa, 435; and *Campbell v. Leonard*, Id., 489.

The court, however, charged the jury that there may be, notwithstanding the rule, as above laid down, a retention of possession under such circumstances as will be a badge or evidence of fraud. "If" says the court, "the retention after the debt is inconsistent with the nature of the property, if it is long continued; if meanwhile, the property is depreciating, and the debtor is getting the benefit of it, and no reduction of the debt secured by the mortgage is made, these circumstances, unless explained, and shown to be fair and honest, would, I think, justify a jury in inferring that the mortgage was not *bona fide*." Under the rule, as laid down by this court in the cases above cited, this charge of the court is certainly not unfavorable to the defendants.

The appellants next insist that the court erred in its refusal to charge the jury that the good faith of the judgment confessed by Veiths, to defendant, Haaman, could not be inquired into by the plaintiff in this proceeding, and that, so far as Haaman is concerned, it matters not whether the judgment was fraudulent, or otherwise.

The plaintiff claims that the defendant cannot justify taking the property, sued for, under the writ of execution, for the reason that the judgment upon which it issued was void, first in being irregular on its face, second, because it was obtained through fraud. The court, in its charge, directed the jury that they had nothing to do with the question as to whether the judgment was void, on account of the irregular manner in which it was obtained. Of this portion of the charge the defendant does not complain, as it

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is in accordance with the instruction asked. The verdict of the jury being for the plaintiff, he makes no objection to this ruling. We do not, therefore, propose to determine the question as to whether the judgment is void upon its face. The court, however, instructed the jury that it was their province to inquire whether, in point of fact, the judgment, by confession, was fraudulent. We are inclined to the opinion, that upon principle, as well as upon authority, this ruling was correct. "Fraud is an extrinsic, collateral fact, which vitiates the most solemn proceedings of a court of justice." Lord COKE says it "avoids all judicial acts, ecclesiastical or temporal. In civil suits, all strangers may falsify for covin, either fines, or real or feigned recoveries, and even a recovery by a just title, if collusion was practised to prevent a fair defense." See Opinion of Lord Ch. J. DE GRAY, in the "*Duchess of Kingston's Case*," 2 Smith's Leading Cases, 508. Where a judgment and execution were obtained upon a fraudulent contract, and the sheriff is sued for a false return of the execution, on account of paying the money to another execution creditor, held it was competent to show the fraud in defense. PARSONS, C. J., says: "The judgment appears to be fraudulent against creditors; any creditor on whom it is a fraud may give the facts in evidence, and if the creditor would be defrauded by it, the defendant, (sheriff,) whom he has indemnified, may give them in evidence." See *Pierce v. Jackson*, 6 Mass., 242; *Gregg v. Bingham*, 1 Hill S. C., 299; *Bunell v. Johnson*, 9 John., 243; *Craig v. Sprague*, 12 Wend., 41; *Atkinson v. Allen*, 11 Vermt., 619. Nor do we think that the rule urged by the defendants, that the plaintiff cannot attack the judgment without judgment and execution in his favor, will apply in this case. The plaintiff relies upon the chattel mortgage, as giving him a right to the possession of the property seized under the execution. He has no judgment, nor does he desire

one. By his possession, he has acquired every right that he can obtain by virtue of his security. The defendants attack the validity of the plaintiff's title, and the plaintiff certainly has a right to show that the defendants' claim is based upon a fraud.

The court properly directs that none but *bona fide* creditors can attack a mortgage as fraudulent, and that defendants, unless they were *bona fide* creditors, could not molest the plaintiff in his possession.

The next error assigned is, that the court erred in overruling the defendants' motion for a new trial. This motion is based upon the grounds usually assigned as causes for a new trial.

We cannot say that the verdict was against the evidence. There is, to our minds, sufficient evidence to show that the plaintiff's chattel mortgage was taken in good faith, and for a proper purpose. He had a right, under the rulings of this court, based, as they are, upon a statutory provision, to leave the property mortgaged in the possession of the mortgagor, without such possession being evidence of fraud, although we think that the jury had good cause to conclude that before the levy of defendants, the property was not in the possession of Veiths. This mortgage, being duly executed and recorded, and given for a good consideration, the right of the plaintiff to the possession was complete prior to the date of defendants' judgment, even if the defendants should show that it was not obtained through fraud.

It is claimed that this motion should have been sustained, because the special findings of the jury are in conflict with their general verdict, and that the judgment of the court should have been rendered in favor of the defendants, upon these special findings, *non obstante veredicto*.

We need only say, in answer to this position, that not all of the issues made by the pleadings were submitted to the jury for their special findings. For instance, it does not

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appear that the jury found specially, whether the judgment by confession was obtained by fraud. If they did so find, and we think they could have so found from the evidence, the verdict should have been for the plaintiff, notwithstanding their finding upon the special issues. But the record shows that four of the special issues, out of the five submitted, were found by the jury favorable to the plaintiff, and we could readily justify the judgment for plaintiff upon these special findings.

Affirmed.

LEVI V. KARRICK *et al.*

1. **SETTLEMENT OF ACCOUNTS: RECEIPT.** A receipt showing a settlement between the parties is *prima facie* evidence that they have adjusted all matters touching the business or adventure to which it relates; and until rebutted by showing that it was obtained by fraud, executed without proper knowledge of the facts, mistake or the like, is conclusive evidence of what it contains. And when the evidence supporting and impeaching such a receipt is balanced, the receipt must have its *prima facie* effect.
2. **COMPENSATION OF COPARTNER.** As a general rule, every copartner is bound to exercise due skill and diligence in promoting the interest of the copartnership, without reward or compensation, unless it be otherwise agreed between the parties; but such agreement may be implied from the course of business pursued between the copartners, as disclosed by the evidence; and when a partner renders services which neither the law nor the agreement of the parties imposes upon him, an agreement that he shall be paid is implied.
3. **RECEIVER: RIGHTS OF THIRD PERSONS.** It is competent for a court of chancery, by an interlocutory order, to take possession of property which is the subject of litigation pending the proceedings; but when the rights of third persons, in no manner parties to the suit, and who have purchased in good faith, have intervened, such power should not be exercised.
4. **BAD FAITH OF COPARTNERS.** A partner is required to exercise toward his copartners the utmost good faith in all matters relating to the copartnership, and if one deals with or uses firm property, he will be held to account for all profits arising from such use or transaction, and if loss arises from his fraud he is liable to his copartners for all injuries from such misconduct.

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5. **SAME: PLEADINGS.** To entitle copartners in a suit to settle the business of the firm, to recover against a partner damages for the fraudulent use of firm property, the proper basis must be laid in the pleadings by allegations of the misappropriation complained of.
6. **RULES FOR THE STATEMENT OF AN ACCOUNT.** When a copartnership was formed for the purpose of working a mining interest in certain lots owned by the copartners, and each partner was to pay his equal proportion of the expenses according to his mining interests in said lots; and when the books of the copartnership were for a portion of the time in which the firm were engaged in mining, so kept that it was impossible to separate the expenses, it was held:
1. That in stating the accounts for the term during which they were kept separately, each partner should be charged with his proportion of the expenses incurred in raising mineral on each lot.
 2. That in stating an account for the time during which they were not thus kept, the entire expense should be apportioned to each lot in proportion to the value of the mineral raised, and the copartners charged in the ratio of their interest in each lot.

Appeal from Dubuque District Court.

WEDNESDAY, JUNE 11.

THIS case was before this court at the June Term, 1859. (8 Iowa, 150.) The bill was filed by Levi, in November, 1857, to dissolve and have settled a partnership formed between himself and the respondents, Karrick and Jones, in August, 1854. The partnership agreement was verbal, and the object was to work certain mining interests owned by the parties in mineral lots 264 and 265. They also had a mining interest in lot 268, known as "Carter's field," but as no mineral was raised from this, it may be dismissed without further notice.

Lot 264 was known as the "Starr lot," from which Karrick and Jones were to receive the ground rent, or one-fourth of the mineral raised, and in the working or mining interest, Levi owned eight-eighteenhs, and Karrick and Jones, five-eighteenhs each.

Lot 265 was known as the "Levi lot," and from this Levi was to receive a like ground rent, and one-sixth of the

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mining interest, while Karrick was entitled to two-sixths, and Jones to three-sixths of that interest.

The lots were adjoining, and were worked by the parties until after the commencement of this suit. In this adventure, expenditures were incurred to the amount of near \$85,000 exclusive of rent, while mineral was raised to the value of about \$137,000. It is charged in the bill that "each partner was to pay his equal proportion according to his mining interest in said lots, of all expenses necessary to carry on said business of mining therein." This averment is not denied. But from the fact that large expenses were incurred in the purchase of gins, engines and other machinery, which were used in such a manner as to render it difficult, if not impossible, to tell whether such outlay should be charged to the one or the other of said lots, the parties disagreed, and hence the occasion of this litigation.

The cause before the former appeal had been referred, and was brought here to test the correctness of the finding of such referees. For the reason, among others, that the referees had adopted an improper rule in charging the expenses incurred in working these mines, the cause was reversed and remanded.

After this, in the court below, an order was made dissolving the partnership, appointing a receiver to take charge of the effects, and referring the case to a master in chancery, "to inquire and state all the facts and the testimony, also an account between the parties according to the decision of this court." On the coming in of this report, exceptions were filed which were overruled, and the master's action, after some amendments made by consent of parties, was in all respects confirmed. From these rulings respondents appeal.

Thomas M. Monroe, S. F. Miller, Allison & Crane and Samuel Duncan for the appellants.

O'Neill and Harvey for the appellee.

WRIGHT, J. — It is seldom that a case is brought before us, involving more difficult or intricate questions than the one now presented for our determination. These difficulties arise, not so much from the questions of law discussed by the counsel, as from the novelty of the controversy, the character of the agreement between the parties, the manner in which the accounts were kept, the mass of testimony, at times conflicting, and difficult to reconcile, and the course pursued by the parties in making their expenditures, and working their lots.

After listening to and reading the very full and able arguments of counsel, after patiently examining a most voluminous record, and the several statements of the account, as claimed by either party, we have arrived at certain conclusions, which must form the basis of a final settlement of their respective rights. 1. The second, third and fourth exceptions to the master's report, raise the question, whether he determined correctly in finding that there was no settlement between the parties, as charged by the respondents, on the 1st of November, 1855.

On the 24th of November, 1855, plaintiff executed this receipt:

"\$392.67.

Dubuque, Nov. 24, 1855.

"Received of Geo. Ord Karrick, superintendent of the diggings owned by Karrick, Levi & Jones, three hundred and ninety-two dollars and sixty-seven cents, in full settlement for my interest in said diggings to the 1st day of November, instant, as shown by account current rendered by said Karrick.

"A. LEVI."

It was agreed on the 29th of October, 1860, that a copy of this receipt should be used in evidence, with like effect as the original.

For several reasons we feel bound to conclude that the

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master erred in stating the account for the period anterior to the 1st of November, 1855.

The receipt is unambiguous in its terms. It expressly acknowledges the receipt of so much money in full settlement of all that was due for his "interest in the diggings" to the date named. Its execution is not denied, but admitted. The familiar rule is not controverted, that *prima facie*, this paper, like all others importing a settlement is evidence that the parties then adjusted all matters touching the business or adventure to which it relates. This is affirmative, and, until rebutted, conclusive evidence of what it contains. The burden is thus thrown upon the complainant, to impeach it, by showing that it was obtained by fraud, executed without proper knowledge of the facts, mistake, or the like. With him was the laboring oar, as to this issue, therefore. And so far from impeaching it, we think the evidence and circumstances clearly tend to maintain it.

In May, 1858, the referees made their report, which was before us when this case was heard on the prior appeal. It is found in this record, and they expressly state that there was a full settlement on this date, and that each of the copartners was paid his full share of the proceeds arising from the copartnership business up to that time. And while complainant excepted to this report upon eight distinct grounds, he makes no objection to this finding, nor a suggestion, even, that it was erroneous. Then again, Karrick, who was the active partner in the firm, sets up this settlement in his answer, filed in February, 1858, and yet complainant made no effort by pleading, testimony or otherwise, to invalidate this receipt until the 30th of October, 1860, the day on which the master closed the testimony, and this he does by his own deposition. Giving to his testimony, however, all the weight that can be consistently claimed, it is fully met by that of Karrick on the

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same subject, taken in September of that year. The evidence of Karrick is quite as clear, quite as reasonable, and quite as conclusive upon the point in controversy, as that of complainant. And if they stand equal, the receipt must have its *prima facie* effect. But without pursuing this subject further, it seems to us that this effort to avoid the force of this settlement, years after it was made at the close of the testimony, by the uncorroborated evidence of the party in interest, after there had been one report of a competent tribunal, unexcepted to, affirming its validity, has entirely failed, and that these exceptions to the master's report should have been sustained. With the account prior to the 1st of November, 1855, therefore, we have nothing to do, except as it may aid in determining matters arising subsequently.

2. The fifth exception is that the master erred in refusing to allow the respondent, Karrick, for his services as superintendent of said mining operations. Upon this subject the finding is, that he acted as superintendent during the greater portion of the time, that he devoted a considerable part of his time to their affairs during the early part of his superintendence, and all of it after that, that he did so without any agreement or understanding that he was to receive compensation therefor, and that he was not, therefore, entitled to pay for such services.

The general rule upon this subject, as stated by Judge STORY, is: "That as there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern; it follows that he must do it without reward or compensation, unless it be expressly stipulated for between the partners, as it well may be under peculiar circumstances." This is a correct statement of the general rule where the partner is acting simply in the discharge of his duty as such partner, for while he is taking care of the joint

property, he is also attending to his own interest, performing duties implied in, and constituting a part, at least of the consideration for the others to engage in the partnership. "The law," says the same author, "never undertakes to measure and settle between partners the relative value of their various and unequal services, for the obvious reason that it is impossible to see how far in the original estimate of the parties, when the connection was formed, the relative experience, skill, ability, or even the known character and reputation of each entered into the adjustment of the terms thereof." (Part., § 182.)

This is the general rule, and the substance of the reasoning used to show its propriety. But like many general rules, experience has shown, by the application of the same reasoning, that it is not inflexible. That is to say, if an agreement that the partner shall be paid for his services can be fairly and justly implied from the course of business between the copartners, he is entitled to recover. The question is one of evidence, or contract, and whether the right to recover is established by necessary implication or from express stipulation, the rule is the same.

This rule is maintained by *Caldwell v. Lieber*, 7 Paige, 488, cited in the note to § 182, Story on Part. So in *Lewis v. Moffatt*, 11 Ill., 392, it is held that the firm may be liable when such an agreement may be implied from the course of the business between the partners, or from the nature of the services rendered, in connection with the duties and obligations imposed by the copartnership articles upon the several members of the firm, that there is no inflexible rule that one partner shall not recover for extraordinary and unusual services, without an express agreement to that effect.

Then, again, this rule is well settled: that if a member of the firm is employed to render services which neither the law, nor the agreement of the parties, impose upon him,

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an agreement is implied that he shall be paid. And hence it was held in *Bradford v. Kimberly*, 3 John. Ch., 481, that: "Where the several owners meet, and constitute one of the concern an agent to do the whole business, a compensation is necessarily and equitably implied in such special agreement, and they are to be considered as dealing with a stranger." Following the same line of argument, Justice CATON, in *Lewis v. Moffat*, *supra*, says: "In this case, it is true, there was no express contract that Lewis should be paid for the services which he should render, but when he was expressly requested and employed to render those services, which he was under no more obligation to render than a stranger, and when he has devoted his time and talent to the business of the firm upon such request, it is but reasonable and just that he should be paid for his services."

Following the law as recognized by these cases, we think the master erred in refusing compensation to Karrick, for his services as superintendent. The testimony satisfies us that he acted as superintendent with the knowledge and consent of all the partners. The agency was one of hazard, and required a large amount of skill, and business capacity. The mines were, for a portion of the time, worked day and night, and he was frequently there at all hours of both. Upon him devolved the employment of a large number of hands. He superintended the books, (not, perhaps, in the most satisfactory manner,) the settlements with hands, and their payment, and had to supervise valuable machinery, and to look after the general interest of the partnership. In a word, we think it equitable and just, and entirely in accordance with the understanding of the parties, that he should be paid. The only matter to be determined, is the amount of that compensation. And, in fixing this, we are not to be governed alone by the opinion of witnesses. It is our duty to "look at the nature and character of the services rendered, the time employed, the skill and talent

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exercised, and the benefits derived to the firm, and then, by exercising our own judgments, in connection with the judgments of others," come, as near as practicable, to a satisfactory conclusion.

Counsel claim for him \$5 per day, for twenty-one months, or \$3,150. Under the circumstances this is too much. He is, of course, entitled to nothing prior to November 1, 1855, the time of the settlement. For a portion of the time after that, until his superintendency ceased, (Aug. 1, 1857,) the work was not heavy, not such as to engage him constantly, as it did subsequently. A fair average compensation will be \$75 per month, for the twenty-one months, amounting in the aggregate to \$1,575.

8. After the appointment of the Receiver, respondents, upon a showing made, moved that he be directed to take charge of the property of the firm, composed of engines, gins, and other machinery used about such mining operations, and that he be authorized to lease or rent the same, and also to remove said Receiver, and appoint some suitable person in his place. By consent this application was referred to the master who overruled it, and the exception to this action is the next matter brought to our attention.

Under the circumstances disclosed, we conclude that this ruling was correct. No good reason is shown for the removal of Wood (the Receiver first appointed). And while, as to the other part of the motion, there was nothing in the state of the pleadings to prevent such an order, yet the fact that the property had passed into other hands, (and this fact is found by the master,) was a sufficient answer to the application. It is competent for a court of chancery, by an interlocutory order, to take possession of property which is the subject of litigation, pending the proceedings. If, however, the rights of third persons, in no manner parties to the record, have intervened; as in this case, if they have purchased the property in good faith, the Master or

Chancellor will not exercise such a supervisory control as to order it into the possession of the Receiver. These purchasers have rights which cannot be adjudicated in this summary and collateral method.

But growing out of this question is another, urged with great persistency, and which is, in fact, of great importance to the parties.

Under a judgment, in favor of "The Bank of Auburn," against Karrick, Levi & Co., the property now under consideration was sold by the sheriff, and bought, as respondents claim, by the complainant, Levi, he paying for it, as they insist, in whole or in part, with the funds of the partnership. All this is denied in argument, by the complainant, he insisting that he bought it in good faith from the purchaser at such sale, and paid for it with his own means. The impression the testimony has made upon our minds, inclines us to believe that there was an understanding between Levi and the purchaser, at the sale, that complainant was to have the property by paying the amount of the bid, and the balance due on the judgment, which he subsequently did. It is left in much doubt, however, whether he used any other than his own means in making such payment. But whatever the facts may be, a difficulty meets us at the threshold, which first demands our attention.

It is true that each partner is required to exercise towards the other the utmost good faith in all matters relating to the copartnership. And if one deals with or uses the firm property, he should be held to account for all profits arising from such use or transaction. Not only so, but if loss arises by his fraud, he is liable to remunerate his copartners for all injuries arising from such misconduct. But it seems to us that to entitle the other partners to recover for such fraud, such failure to exercise good faith, such use of the joint property, there should be some predicate for it

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in the pleadings. If these matters occur pending the action, then they should be presented to the court in the form of further, supplementary, amended or other pleadings. Until this is done, we are not aware of any rule which would justify the court in charging a party with the consequences of such fraud. In this case, however, there is no intimation anywhere, in any of the pleadings, that complainant had fraudulently converted the property to his own use, that he had used it for his own gain, or that he had exercised other than the utmost good faith in his connection with it. For his own protection, it was not necessary that complainant should have asserted his title in a supplemental bill, and thus had it adjudicated. The position of respondents is not that this property shall be surrendered up and treated as assets, (for having, as we have seen, passed into other hands, "The Julien Mining Co.," this cannot be done,) but that complainant shall be charged with its value, which they estimate at some fifteen thousand dollars. To charge him with its value, they must maintain that, as the trustee of the copartnership, he had no right to purchase it for his own use. If, however, he purchased from a third person, in good faith, he would be protected in his title, and not liable to account for its value. And this issue should have been made by the pleadings. Until there was some pleading, advising complainant that he was sought to be thus charged, he was not bound to defend, nor could he be made liable. And, therefore, while upon the question of fact, we should be inclined against complainant, as the record stands, we think the master did not err. And we feel less hesitation in thus concluding from the fact that while the point is argued by counsel, no specific exception was taken to the master's report, upon this ground, in the court below.

4. It is claimed that the master erred in the amount allowed Karrick and Jones as ground rent for mineral raised on the "Starr Lot," for the months of February and

March, 1858. This is a question of fact, to be determined from the testimony. An examination of this fails to satisfy us of the alleged mistake, and this is all we have to say upon this point.

5. But the question of greatest magnitude, and that upon which counsel have bestowed the most labor, still remains to be considered.

As to certain matters, there is no controversy. We can easily ascertain the amount of mineral raised on each lot, the price for which it was sold, the respective interest of each partner therein, the amount of rent paid, and the *aggregate* amount of expenses. But as the respective shares of the parties in these lots differed, it is a matter of vital importance to settle upon some just rule by which to apportion these expenses. Thus, to illustrate, as respondents were to pay five-sixths of the expenses of working the "Levi Lot" and but five-ninths of said expenses on the "Starr Lot," it is to their interest to charge as large a proportion of these expenses as possible to the "Starr Lot." And it is, in like manner, the interest of the complainant to make "Levi Lot" liable, so far as he can, because he thereby decreases the amount he would have to pay.

It will be remembered that the contract was, "that each partner was to pay his equal proportion, according to his mining interest in said lots, of all expenses necessary to carry on said business of mining thereon." When this cause was formerly before us, in giving a construction to this contract, we used this language: "The referees were bound by the agreement of partnership, in stating an account, to charge to each partner his proportion of the expenses in raising mineral on each lot, according to his interest in said lot. They have departed from this rule, in those instances in which, instead of ascertaining the actual expenses incurred upon each lot for a given period, they have apportioned the expenses between them in proportion

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to the amount of mineral raised on each lot. * * * *
We do not know that the rule adopted by the referees affords any correct criterion for ascertaining the amount of expenses to be charged to the separate lots, and, in the absence of any agreement that such should be the rule, we think it was their duty to ascertain the true amount of expenses to be charged to each lot." And afterwards, in speaking of certain machinery, purchased principally for the "Starr Lot," but used for both, it is said: "The referees should have apportioned the expense of the machinery and labor, to each lot, according to the benefit or advantages accruing to each lot by the expenditure."

Then the testimony was not before us, and the difficulties which now present themselves, in giving a practical application of the rules stated, did not arise. That the views then expressed are correct, we entertain no doubt. Whenever the expenses on one lot can be ascertained, separate from the other, then it is perfectly clear that the parties should pay them in proportion to their respective interests. In such a case the matter should be treated just as if the other lot did not belong to them. And it was upon the supposition that these expenses could be thus ascertained, and charged to each lot, that this rule was given for their apportionment. It has been made perfectly apparent, however, since the parties have exhausted all the channels of evidence within their reach, that these expenses cannot be thus divided. The very nature and character of the business transacted, now that it is all before us, suggests the difficulty. These lots were contiguous. The lode was worked from east to west, passing first through the "Levi," and then into the "Starr Lot." For some months, a large amount of mineral, found on the "Starr Lot," was carried back along the drift on the "Levi Lot," and thence lifted through a shaft which had been previously sunk on the last lot, for the purpose of working out the

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mineral found on that lot alone. This was found inconvenient, and as the owner of the "Starr Lot" would not permit them to sink a shaft thereon, they determined to sink one immediately upon the line between the two, and thus shorten the length of the drift along which they had to carry the mineral. After this, they had to deepen the drift, in order to carry off the water, and, in doing this, mineral was struck on the "Levi Lot," which, for some time, had been yielding but little. And, in doing most of the work, and all of that involving the heaviest expenditure, the parties had to use the same hands, horses and machinery; and it must be manifest to the plainest comprehension that it would be next to impossible for any superintendent or book-keeper to tell, each month, just what proportion of this labor and expense was expended upon each lot.

It was the custom of the superintendent to close his accounts each month. And whenever the expenses were incurred exclusively upon one lot, he so stated. And in these instances we have no difficulty. The master apportioned the expenses for these months, according to the interest of each partner in such lot. And thus far, the parties agree. When this could not be done, he divided the expenses equally between the two lots, and made each partner pay the same, according to his respective interest, which he regarded, to use his own language, "as the nearest approximation that can be made to the directions of the Supreme Court, in the dim light of the evidence as to the expenses on each lot, in some instances, and its total absence in others."

Respondents object to this rule, and suggest two others. The first is: To apportion the entire expenses of the work upon each lot in proportion to the amount of mineral raised, and then charge the parties in the ratio of their interest in the respective lots. The second is: To charge

the vast bulk of the expenses, all except what are incident to the mere raising of the lead from the "Levi Lot," to the "Starr Lot," and to the parties in the proportion of their interest in that lot.

If respondents' assumption, that these expenses were incurred for the purpose of raising mineral from the "Starr Lot," and with the understanding between the parties that they should be paid for in the ratio of their working interest therein, was sustained by the evidence, the rule would be unquestionably correct. For this would be in perfect harmony with the spirit of their contract, and the rule followed in those cases where the expenses were kept separate. And yet the *object* for which the machinery was purchased, is not alone a safe criterion, for though designed to assist in raising mineral from one lot, if it was used upon the other, that other, in the absence of agreement, should bear its due proportion of the expense. Not only so, but under the evidence submitted, the rule is not, in our view, practicable. The work upon the two lots was so intimately connected, that it is impossible to tell, with any fair approximation to certainty, what was the principal, and what the incidental, use of the machinery. Abstractly, the rule is correct, but it cannot be applied to the actual facts, as developed by the testimony.

Nor do we think the rule adopted by the referee correct. True, it is susceptible of a practical application, but it seems to us inequitable and unjust. According to this, it makes no difference how great the disproportion between the mineral raised upon the one lot as compared with the other, or how little the benefit or advantage in one case, or how great in the other, the entire amount is divided, and the parties required to pay each half according to his working or mining interest. Thus, assuming that the aggregate expenses were \$65,000, the rule makes the "Levi Lot" pay one half of it, or \$32,500. But the mineral raised

from this lot was, say \$15,000, while that raised from the "Starr Lot" was over \$120,000. Now, while respondents were entitled to five-sixths of this \$15,000, they would, under this rule, have to pay the same proportion, or five-sixths of one-half of the entire expenses, or about \$27,000. And, on the other hand, while complainant would get four-ninths of the \$120,000, or say \$53,000, he would pay but four-ninths of the estimated expenses, or say \$14,500. Of course, in this statement, we do not pretend to critical accuracy, for, to say nothing more, there would of course have to be excluded those months, or the time, when the books showed that the expenses were kept separate. We merely use these figures to show that, as a rule, it cannot be correct. Nor does it accord with the spirit of the rule, as heretofore given by this court. For, in the absence of testimony as to the lot upon which the expenses were actually incurred, it ignores the idea that they should be apportioned "according to the benefit or advantage accruing to each lot by the expenditure."

We then come to the rule which, in those cases where the expenses were not kept separate, apportions the entire amount upon each lot in proportion to the value of mineral raised, and charges the parties in the ratio of their interest in each lot. This rule may not be in all cases just, but it recommends itself as more nearly so than either of the others, under the circumstances. It is simple, and of easy application. And we do not see why it will not be substantially just and equitable. It certainly has the merit of requiring the parties to pay for the benefits derived, in proportion to their interest therein. It treats the operations upon each lot as a distinct adventure, and by approximating the expenses as near as possible under the confused manner in which the accounts were kept, makes the parties share the expenditure in the ratio of their receipts.

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And here speaking of the manner in which the accounts were kept, about which much has been said by counsel, we deem it proper to say that we see no reason for making Karrick or either of the respondents liable for any neglect in this respect. There is no evidence to satisfy us that they were guilty of fraud, or that they had any sinister motive. It is possible that they might have been kept more intelligibly. And yet, under all the circumstances, it was nearly, if not quite, impossible to keep the expenses on the two lots distinct. In the absence of some fraudulent purpose, we do not think they should suffer by having applied an onerous or inequitable rule, in the settlement of a partnership, which was entered into in the most friendly manner, but which has been dissolved only after a most protracted and bitter litigation.

The case will be referred to a master, to state the account in accordance with this opinion, that a final decree may be entered in this court. The question of costs, and all others not herein disposed of, will be reserved until that time.

The cause was referred to THOMAS F. WITHROW, as master, and upon the filing of his report a decree was entered in this court. The complainant and appellee, Levi, and the respondent and appellant, Waters, filed petitions for a re-hearing. In overruling the applications the following opinion was delivered by :

WRIGHT, J.—Since the filing of the foregoing opinion, Levi and Waters have, by their counsel, presented for our consideration elaborate arguments for a re-hearing, and have urged, with much zeal and apparent plausibility, that injustice has been done them in the rulings made, the report of the master, and the decree founded thereon.

While we continue of the opinion that we have enunciated the law correctly, as applied to the facts of this case, the magnitude of the cause, and the great research shown by counsel in presenting it for our consideration, perhaps demand that we should briefly state our reasons for refusing their application.

And *first*, as to the settlement of November 24, 1855. As to this, we deem it unnecessary to restate the considerations which induced us to hold that there was not sufficient testimony to impeach the *prima facie* effect of the receipt of that date. But we may notice a point now presented by counsel, which was not urged, or if so, not much relied upon in the first argument. It is asked: "Of what is this receipt a settlement? To whom is it a settlement? Not with Jones, for he is no party to it. It is between his two partners—not signed by him, or under his control, or agreement. Jones is clearly not estopped by it. But if Jones is not, then Levi is not. Estoppels are odious in law, and, to be binding, must be mutual." These inquiries, and this reasoning, misapprehend the language of the receipt, as well as the effect given to it. Thus it must be borne in mind, that Karrick, who paid the money to Levi, and took the receipt, was the superintendent of the diggings worked by the parties. He was the agent of the partnership—received all money arising from the sale of mineral, and paid it out to the partners or other persons entitled to the same. The receipt is to him: "in full settlement for my (Levi's) interest in the diggings." This language is fairly susceptible of but one construction, and that is, that Levi admitted that he had received all that was coming to him to that date, from the proceeds arising from the working of the mines. It was not conclusive upon him, and we never have so held. Nor was it more binding upon Jones. But it does show *prima facie* that this much was owing to Levi, and no more. And to this extent would Jones be

bound by the action or settlement made by Karrick, as the agent of the firm. And as Jones might impeach it, so might Levi. The effort was made, but unsuccessfully—and therefore, we gave it before as we do now, its *prima facie* effect.

Next, as to the amount allowed Karrick for his services as superintendent. If, under the testimony, and the rules of law governing, he is to be allowed anything, we are satisfied that his compensation has not been fixed too high. We do not understand the principles of law, declared by us upon this part of the case, to be controverted; but the claim is, that \$75 per month, under the circumstances, is extravagant. If governed alone by the opinion of witnesses as to the value of these services, we should certainly have allowed more than this amount. We determined, however, that we were not to be governed alone by these opinions. We exercised our own judgments, in connection with these opinions, to arrive at a conclusion as nearly satisfactory as practicable. We could not interfere with this finding without coming in conflict with the great body of the testimony on this subject, and losing sight of the hazard incurred, and skill requisite in superintending the large business carried on by these partners.

But it is, in the *third* place, claimed that an incorrect rule was adopted, in apportioning the expenses incurred in raising mineral from these lots. And it is now insisted that, by the terms of the partnership, these expenses should be apportioned to the several partners according to their interest in *both* lots, and not their interest in *each* lot. In other words the position is, that Jones should pay fourteen thirty-sixths, and Karrick and Levi eleven thirty-sixths each, of the *entire expenses*, instead of apportioning them on each lot in proportion to their interest in each, or the amount of mineral raised from them severally. This rule is condemned by the construction given to the contract by

the parties themselves, for, so far as the expenses were or apparently could be kept separately, they were so charged, and each lot was made to pay the expenses incurred thereon, in proportion to the interest of each partner therein. It was only after the work was so carried on that this could not be done, that this view or construction of the contract was departed from. And then, without pretending to apportion the expenses, they were charged generally, without any apparent intention of determining how they should be finally divided. Then, again, this contract received a contrary construction, after the most careful consideration, when the case was first before us in 1859. 8 Iowa, 150. For it is there expressly stated that "the referees were bound, by the agreement of partnership, in stating an account between the parties, to charge to each partner his proportion of the expenses in raising mineral *on each lot according to his interest in said lot.*" The argument against a division of the expenses, according to some rule, has not in all this protracted litigation, been before urged upon our attention, and we are not prepared, in the face of the action of the partners themselves, and the construction given to the contract on two occasions, after elaborate argument, to change our ruling.

Fourth. It is claimed by Waters that he was not owing Levi, Karrick & Jones anything, and that the sum of \$985.99, found against him by the master, is grossly unjust and inequitable. In support of this position, he now produces the affidavit of Karrick, the superintendent, and one of the partners. It may be unfortunate for him that this testimony (for it is nothing else), was not introduced in the District Court. We are not prepared, however, to recognize the right of a party to make out his case, after it has been appealed to and determined in this court. This cause has been pending since 1857. Waters knew before, as well as since, the determination of the cause, that Karrick proba-

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bly knew whether he was indebted to the firm. If he did not obtain his testimony in time to avail him, and injustice has been done, he must suffer the consequences. If Karrick and Jones, or either of them, are of the opinion that Waters should not be charged with this sum, then, as a certain proportion of it is decreed to each, they can release him *pro tanto* from his liability. From the testimony submitted, and legitimately before us, the decree in this respect we regard correct.

A great many alleged errors are pointed out in the report of the master, in stating the account, under the rules established by the former opinion. And in this connection it is urged, as a cause for rehearing, that petitioners were not present when this report was presented and had no opportunity to take exceptions to it. To this the reply is, that it was expressly requested by all parties, when the cause was submitted, that a final decree should be rendered in this court. The opinion was announced near three weeks before the entry of the final decree. All parties were notified of the result, advised that a master had been appointed, who would report at the same term, and had ample opportunity to be heard, if they so desired. We need only say, that if a party has had an opportunity to be heard, and fails to avail himself of it without good excuse, he cannot be permitted to urge his own laches, as a reason for a further hearing.

As to the alleged errors, we remark, that we have with the assistance of a most able and experienced accountant, re-examined the report, and find that it is not subject to the objections urged. The case is peculiarly complicated. It is only after the most patient examination of the immense mass of testimony, that anything like satisfactory results can be arrived at. If critical or mathematical accuracy has not been reached, it must be attributed to the character of the adventure entered into by these parties,

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and their method of conducting the same, and certainly not to a failure on the part of counsel to faithfully and ably present the cause of their respective clients. We have met with difficulties at every step. In their solution, we have given the case our most laborious attention. And believing that further argument and investigation would not change the results, as heretofore announced, we are constrained to refuse these applications.



SELLON & CO. V. BRADEN, ADMINISTRATOR.

1. JOINT OBLIGATION: ACTION AFTER DEATH OF AN OBLIGOR. At common law an action could be maintained on a joint obligation, after the death of one of the obligors, only against the survivors: but under § 2764 of the Revision of 1860, an action may be maintained against either the administrator of the deceased obligor or the survivors; whether the death occurred before or after the taking effect of the Revision.

Appeal from Lucas District Court.

THURSDAY, JUNE 12.

THE facts are stated in the opinion of the court.

Casady & Polk for the appellants.

I. No suit can be maintained against the representative of a deceased joint obligor, the other obligors being alive. This question is well settled at common law. 1 Chit. Pl., 50; 1 Pars. Cont., 28, and the cases there cited.

II. The court erred in entering up judgment against the defendant, as administrator. The only order that could be entered up would be one allowing the claim, and directing

the administrator to pay it out of the funds in his hands. *Voorhees & Co. v. Eubanks' Executors*, 6 Iowa, 274.

The estate was released from all liability on the joint obligation, before the Revision of 1860 became a law, and that liability cannot now be revived.

Warren S. Dungan for the appellee, argued, that whatever may have been the common law touching the liability of an administrator of a joint obligor, on the joint obligation, the right to maintain this action is clearly settled by the provisions of § 2764 of the Revision of 1860.

LOWE, J. — Upon application, a new hearing was granted in this cause, and upon a still closer inspection of the record, and examination of the question presented, we have been brought to the same general conclusion, and must again affirm the judgment below.

The plaintiff's claim consists of a joint obligation against three persons, one of whom had died prior to the taking effect of the new Code of 1860, and the defendant, Braden, was appointed his administrator. Against him, alone, proceedings were commenced before the county court, on said obligation, and were brought by appeal into the District Court, where a final judgment was rendered against the administrator for the amount of plaintiff's claim.

The important question for our determination is whether the estate of the deceased obligor can be made liable at all, it being shown that the other two joint obligors are alive.

The appellant insists that the rule at common law is, that when two or more persons are bound jointly to pay a sum of money, and one of them dies, his death not only severs the joinder, but terminates the liability which belongs to him, so that it cannot be enforced against his representatives.

In such a case it is claimed that the whole debt becomes the liability of the survivors alone, and if they pay the

whole, they have, at law, no right of contribution against the representatives of the deceased, for this would be an indirect revival of a liability which death has wholly terminated.

To sustain this view of the case, he refers to 1 Parsons on Contracts, 28, 29 and 30; 1 Sid., 238; 2 Mass., 572; 14 Barb., 644. It must be remembered, however, that this suit was brought under the Code of 1860, § 2764 of which has changed the above common law rule, and permits the holder of such paper to institute his suit against any one or all of said joint obligors, and if any of them are dead, then it may be brought against any or all the survivors, with or against any or all of the representatives of the decedent.

It is said, however, in answer to this, that the decedent had died in July, prior to the taking effect of the law, in September following, and that the passage of this law cannot have the effect to revive a liability that had already terminated. Our reply to this position is, that, although the liability of the decedent had terminated, as stated, under the stern rules of the common law, yet that it had not, under the more benign and equitable principles of chancery law, and that the holder of this paper, finding the survivors insolvent, might appeal to the equity side of the court for his remedy against the estate. 1 Story Eq. Jur., § 162; 2 Denio, 577; 1 Williams on Executors.

We see no reason, therefore, for turning the plaintiff over to his remedy in equity, when that remedy, by a change of statute, has been so modified, and that, too, before this suit was brought, as to enable the plaintiff to avail himself of it at law.

Judgment below affirmed.

Hall v. Doran & Baker.

HALL V. DORAN & BAKER.

13	368
61	687
13	368
95	68
13	368
128	730

1. **DEED IN EQUITY.** A deed executed by a county judge, under the county seat pre-emption Act of Congress, passed April 6th, 1854, to a party in possession wrongfully or by fraud against the party legally entitled thereto, will be treated in equity as conveying only the legal title in trust for the beneficiary. The grantee thus holding the property subject to the paramount equity, may be decreed to convey.
2. **SAME: ESTOPPEL.** A court of equity will not enforce such a conveyance when the party legally entitled thereto has neglected and failed to assert his right or to enforce his ownership of the property, for such a length of time and under such circumstances as to estop him from questioning the title of the actual occupant.

Appeal from Pottawattamie District Court.

THURSDAY, JUNE 12.

THE petition represents that in 1850, one John Martin was the owner and occupant of a certain claim on land belonging to the government of the United States, and situated in the town of Kanesville, Pottawattamie county, Iowa; that Martin while in possession had large and valuable improvements thereon; that on the 10th day of July, 1850, he sold said claim to Franklin Hall, and conveyed the same to him by a quit-claim deed; that said grantee took full and peaceable possession under said conveyance, and made valuable improvements on the premises; that in June, 1851, the said Franklin Hall conveyed to the plaintiff; that in the same year the defendants, or those claiming under them, took forcible possession of the premises, and so continue to hold the same; that the plaintiff demanded of the County Judge of Pottawattamie county, a deed conveying said premises, under the act of Congress of April 6th, 1854, tendering the amount which, under said act, entitled him to a deed; that the County Judge, acting fraudulently and in collusion with the defendants, with a full knowledge of plaintiff's rights, refused to execute such deed; but did exe-

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cute and deliver to said defendants a deed conveying to them the property in controversy. The prayer was for a decree compelling the defendants to convey to plaintiff the property in controversy, and for general relief. The answer denied the allegations of the petition, and alleged that plaintiff never was an actual or constructive occupant of the lot in controversy; that they, the defendants, "obtained possession of said premises by purchase from the former legal occupant, and have held and enjoyed peaceable and quiet possession of the same for more than two years before the passage of the act of Congress aforesaid." The remaining facts are presented in the opinion of the court. The plaintiff appeals.

C. E. Stone for the appellant.

Frank Street for the appellee.

WRIGHT, J.—By reference to 6 Iowa, 433, it will be found that this cause was before us in 1858, and remanded, for the reason that the issue determined in the court below was an immaterial one, settling no question upon which to predicate a decree. Since that time, the parties have prepared the case, had it referred to a master, who found the equities in favor of respondents, and this being confirmed by the court below, complainant again appeals.

No argument has been made by appellant. An examination of the evidence, and arguments filed with the master, however, has brought us to the conclusion that the decree below should be affirmed.

The question is, who was the occupant, and entitled to a deed to the lots in controversy, at the time the conveyance was made to the respondents by the County Judge, on the 2d of June, 1854? By occupant, as here used, is not meant, simply, the person who, at the time, may be in the possession of the premises. That is to say, if the deed was made

to one in possession wrongfully or by fraud, against the person actually and legally entitled to it, the grantee would become the trustee for the beneficiary, holding the property subject to the paramount equity, and would be decreed to convey. And, therefore, though complainant was not in possession, and though respondents were such occupants, yet if their possession was in fraud of complainant's rights, this should not avail them. For it was the intent of the Act of Congress and the law of this state, to settle the actual rights and equities of the parties, and not to leave the right to the accident of possession or occupancy at the time the deed was made.

If satisfied, therefore, that the possession of respondents was wrongful, as against the rights of complainant, at the time the County Judge made the deed, we should not hesitate to decree that such possession should be surrendered, and that they be required to convey to the equitable owners.

But, in our opinion, the master puts the case upon the true ground, when he finds that complainant, and those under whom he claims, had neglected and failed to assert their right, or to enforce ownership to the property, for such a length of time, and under such circumstances, as to estop him from now questioning respondent's legal title. The person in actual possession is, in the absence of testimony, presumed to be the rightful occupant. And unless those attacking this possession, and the legal title based thereon, can overcome this presumption by clear testimony, the legal title must prevail. And therefore, where, as in this case, the testimony tends very strongly to show that respondents, and those under whom they claim, had for several years been in uninterrupted possession, that the possessory right had, for a valuable consideration, been transferred, from time to time, by conveyances made and recorded with the knowledge of complainant, that he took no steps to enforce his rights, that respondents made valuable improvements

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thereon, without sufficient knowledge of any adverse claim, notwithstanding complainant lived near the premises and had knowledge of many, if not all, these facts, — we say that when all these matters are taken in connection with the fact that respondents have the legal title, that complainant asserts his superior equity, and upon him, therefore, is the burden of proof, we think that the master and court below might well conclude that the bill should be dismissed.

Affirmed.

KURZ V. BRUSCH.

1. **HOMESTEAD.** The homestead embraces the lot and buildings appurtenant to the house, including those used and occupied by the owner in the prosecution of his ordinary business, but it does not include buildings which are rented to others and yield a revenue to the owner.
2. **SAME OCCUPATION.** The occupation of a building as a homestead after the execution of a trust deed conveying the same, in which the wife did not concur, cannot change the *status* of the parties.

Appeal from Dubuque City Court.

FRIDAY, JUNE 13.

LOT 482 in the city of Dubuque is subdivided into five portions. On the 17th of May, 1858, defendant being the owner of the "South and South Middle Fifth," (styled in the deed the south two-fifths), conveyed the same by a trust deed of that date to Woodruff, to secure a debt to one Ives. Such proceedings were had, under this deed, that afterwards, on the 30th of April, 1860, the premises were sold and conveyed by the trustee to plaintiff. He then commenced this action to obtain possession. Defendant answered, set-

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ting up, among other things, that the premises were his homestead, at the time of making said trust deed. The jury found for the plaintiff as to the south fifth, and as to the south middle fifth, that it was defendant's homestead, and should be set off to him as such. Plaintiff appeals.

Bissell & Shiras for the appellant, cited *Charles & Blow v. Lamberson*, 1 Iowa, 435; and *Yost v. Devault*, 3 Id., 345.

E. Gottschalk for the appellee.

WRIGHT, J. — There is no controversy as to the south fifth. Nor is there any as to a portion of the south middle fifth. On the north side of this, and some distance from the front, or White street, is a one-story brick cottage, occupied by the defendant and his family at the time of making the deed, in which deed his wife did not join. As to this cottage house and such portions of the lot, (the south middle fifth,) as were in good faith used as appurtenant thereto, plaintiff concedes the verdict is right. But as to all other parts of that subdivision, he insists that the verdict was wrong.

The facts are simply these: There is a double brick house situated on this lot, fronting on White street. This was never occupied by defendant as his homestead, prior to the trust deed, nor at any time prior to the commencement of this action, except about two months in the year 1859. It was rented, however, to a number of tenants, and used as shops, defendant having no possession except through such tenants. On the south half there was a planing mill, which was rented on the 1st of May, 1857, for five years, at an annual rent of one hundred and fifty dollars.

Plaintiff now claims that as to all said south middle fifth except the brick cottage, and such portions of the lot as

were in good faith used as appurtenant thereto, he was entitled to recover. In other words, he insists that the double brick house is no part of the homestead.

The principles settled, and the reasoning used by this court in prior cases, bearing more or less directly upon the question here involved, must reverse this judgment.

Thus, in *Charles & Blow v. Lambertson*, 1 Iowa, 435; it is said: "To be the homestead, it must be used, and used for the purpose designed by the law, to wit: as a home, a place to abide, a place for the family. The language of the law is clear. It is that a homestead, consisting of a certain quantity of land, and the dwelling-house thereon, and its appurtenances, *owned and occupied*, shall not be subject to forced sale."

In *Rhodes v. McCormick*, 4 Id., 368; this language is used: "The object of the law is to protect the home and preserve it for the family, and not shops, stores, rooms, hotels and office rooms, which are rented and occupied by other persons. This construction attains the object of the Code in exempting a homestead, and prevents the abuse of a law which was designed to discourage and not encourage fraud."

And so in *Ackley v. Chamberlain*, 16 Cal., 181. "A homestead is the residence of a family, is the place where the home is, and it would seem unreasonable, upon first impressions, that premises should be regarded as a homestead, unless devoted principally to such residence and home."

But aside from these cases, the statute, to our minds is clear and decisive upon this point. After providing that "The homestead must embrace the house used as a home," "and if he, the owner, has two or more houses thus used by him at different times and places, he may select which he will retain," that "it may contain one or more lots or tracts of land with the buildings thereon, and other

appurtenances," it then declares, (Code, 1851, § 1253,) "It must not embrace more than one dwelling-house, nor any other buildings except such as are properly appurtenant to the homestead as such, but a shop or other building situated thereon, and really used and occupied by the owner in the prosecution of his own ordinary business, and not exceeding three hundred dollars in value, may be deemed appurtenant to such homestead."

This section, by the assertion of what may be, as well as what shall not be considered as appurtenant to the homestead, and hence a part of it, frees the question of all difficulty. The purpose and object of the law is most clearly shown. It gives the "dwelling-house," and a shop really occupied in the prosecution of his ordinary business by the owner, but not buildings that are not thus used and occupied. The mechanic needs his shop, the physician his office, to assist him in procuring means for the maintenance and support of his family, as he needs his dwelling. This is the theory of the statute, and he is protected in the one as much as the other. Or, as is said by HEMPHILL, C. J., in *Pryor v. Stone*, 19 Tex., 371; in giving a construction to the peculiar constitutional provisions and statutes of that state: "The exemption should not be construed, as reserving merely a residence where a family may eat, drink and sleep, but also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family."

But it was never intended that other buildings though on the same lot, buildings "not appurtenant to the homestead, as such," those not "used and occupied by the owner in the prosecution of his own ordinary business," — those rented, and yielding a revenue to the owner, — we say it was never intended that such should be exempt. If so, the law could be made the cloak for the most stupendous frauds. For if one such building may be exempt, so may

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all that could be placed upon a half acre, if in a town, or forty acres, if in the country, without limit as to value. And thus the statute, instead of securing to the family a home, where they may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors, would give them property never contemplated by its letter or spirit.

The occupation of the "double brick house" after the execution of the trust deed, cannot change the legal status of the parties. Its subsequent adoption (even if there was such adoption) would not affect the validity of the deed, nor release the property from its operation. (*Yost v. Devaulk*, 3 Iowa, 345.)

The cause will therefore be reversed, and remanded. So much of the south middle fifth as was in good faith actually used as appurtenant to the "cottage dwelling," at the time of the execution of the trust deed, as defined by this opinion, should be set apart to the defendant and as to all other parts, the plaintiff should have judgment.

 KEENAN V. THE DUBUQUE MUTUAL FIRE INSURANCE COMPANY.

13	375
f141	342

1. QUESTION NOT RAISED BELOW. The Supreme Court will not review questions not presented to the court below.
2. WAIVER. The assessment and collection of a portion of a premium note, by a mutual insurance company, after it has been advised of a violation of the conditions of the policy, operates as a waiver of any forfeiture by reason of such violation: following *Keenan v. The Missouri State Mutual Insurance Company*, 12 Iowa, 126.
3. NOTICE TO AN INSURANCE COMPANY. The knowledge an officer of an insurance company acquires by rumor, or by information, in his individual capacity, is not constructive notice to such company.

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Appeal from Dubuque City Court.

FRIDAY, JUNE 13.

THE defendant, upon the 6th day of December, 1856, issued a policy of insurance to the Odd Fellows' Hall Association, upon a building owned by them, in the City of Dubuque. The policy was to run for six years. The building was destroyed by fire in May, 1859. The plaintiff having obtained judgment against said association, notice of garnishment was duly served upon the defendants, and, an issue being made upon the answer of the garnishee, there was a trial by jury, and verdict for the plaintiff.

Defendant appeals.

Bissell & Shiras for the appellant.

1. No notice of loss was given forthwith, as required by the laws of the Company. The loss occurred May 27th, and the notice was not given until June 8th. This, certainly, is not forthwith. *Angell on Fire Ins.*, 293; *Inman v. Western Fire Insurance Company*, Wend. Rep., 452; *Edwards v. Baltimore Fire Insurance Company*, 3 Gill. (Md.), Rep., 176.

2. The policy and application form but one contract. The condition, that "no stage scenery to be introduced and used in the building," is a warranty that no such scenery should be used during the continuance of the policy, and the introduction of such machinery was a breach of the warranty, and rendered the policy void. *Holmes et al. v. Charlestown Mutual Insurance Company*, 10 Met., 214; *Houghton et al. v. The Manufacturers' Mutual Fire Insurance Company*, 8 Met., 114.

3. A policy once rendered void by breach of its conditions by the assured, cannot be revived, unless upon a new consideration, and upon such terms as would make

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a new contract. *Smith v. The Saratoga County Mutual Insurance Company*, 3 Hill, 508 and cases therein cited; *Neeley v. The Onondaga County Mutual Insurance Company*, 7 Hill, 49.

4. If the policy of insurance in this company becomes void, it does not release the assured from his liability on his premium note, and the collection of assessments on such premium note, even when the company knew of the breach which rendered the same void, would not be a rewaiver of such breach, or operate to revive the policy. *Bangs v. Skidmore*, 24 Barb. (N. Y.), 29.

5. The company had no knowledge of the violations of the conditions of the policy, by using "stage scenery," at the time the assessments were made. The only persons who had such knowledge, and were officers of the insurance company, were directors of the Odd Fellows' Hall Association. It is not enough that some of the directors of the insurance company should have had such knowledge; it must be known by the directors *as a body*—*as a Board*. No direct knowledge is brought home to any of the officers except those interested as officers of the assured. *National Bank v. Norton*, 1 Hill, 578; *Farmers' & Citizens' Bank v. Payne*, 25 Conn., 444; *Bank of the United States v. Davis et al.*, 2 Hill, 451.

John H. O'Neill and *John L. Harvey* for the appellant.

1. The first point made in defendant's brief is, that notice of the loss was not given forthwith, as provided by the by-laws of the company. In reply, we say, this question was not raised in, nor passed upon by, the court below, therefore cannot be reviewed by this court. The answer of the garnishee sets forth, specifically, the reasons why the insurance company refused to pay the loss, but makes no mention of this objection, and in all the instructions asked, given or refused, no notice whatever is taken of this point.

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Lorieux v. Keller, 5 Iowa, 196; *Delany v. Reade*, 4 Id., 292; *Jungk v. Jungk*, 5 Id., 541; *Rowan et al. v. Lamb*, 4 G. Greene, 368; *Miller v. Chittenden et al.*, 2 Iowa, 315, 360; *Houston, Garnishee, v. Wolcott & Co.*, Id., 86; *Berry v Gravel*, 11 Id., 135. "Forthwith" means within a reasonable time, and what is a reasonable time is a question for the jury, under all the circumstances. *Columbia Insurance Company v Lawrence*, 10 Peters, 507; *Edwards v. Baltimore Fire Insurance Company*, 3 Gill (Md.), 176; *Kingsley v. New England Fire Insurance Company*, 8 Cush., 393; *Sexton v. Montgomery County Mutual Insurance Company*, 9 Barb., 191.

2. The policy and premium note are dependent contracts. Where the policy becomes void, so that the insurance company could not be compelled to pay a loss, designed to be covered by it, the premium note becomes likewise void, and the company can no longer legally make assessments upon it for losses sustained after the policy becomes void. *Keenan v. The Missouri State Mutual Insurance Company*, 12 Iowa, 126; *Indiana Mutual Fire Insurance Company v. Conner*, 5 Port. (Ind.), 170, decided in 1854, overruling 2 Carter, 645; *Wilson v. Trumbull Mutual Insurance Company*, 19 Penn. State, 372; *Burbank, Admr., v. Rockingham Mutual Fire Insurance Company*, 4 Foster, 550, 560; *Frost v. The Saratoga Mutual Insurance Company*, 5 Denio, 154; *Lynn v. Burgoyne*, 13 B. Monr., 400; *Viall v. Genesee Mutual Insurance Company*, 19 Barb., 440.

8. Where a Mutual Insurance Company, with full knowledge of an alteration in the risk, which would render the policy void, continues to make and collect assessments upon the premium note of the holder of the policy, the jury may infer therefrom a waiver of the forfeiture. *Keenan v. The Missouri State Mutual Insurance Company*, 12 Iowa, 126; *Frost v. The Saratoga Mutual Insurance Company*, 5 Denio, 154; *Viall v. The Genesee Mutual Insurance Company*, 19

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Barb., 440; *Insurance Company v. Stockblower*, 26 Penn. S. R., 199; *Allen v. Vermont Mutual Fire Insurance Company*, 12 Verm., 366; *Leathers v. Farmers' Mutual Insurance Company*, 4 Foster, 259; *Goodall v. New England Fire Insurance Company*, 5 Foster, 169, 190, 191; *Gait v. The National Protective Insurance Company*, 25 Barb., 189; *Ruse v. The Mutual Benefit Fire Insurance Company*, 20 Barb., 556; *Tuttle v. Robinson*, 33 N. H., 104, 114.

4. It will be seen that the President, Secretary and two of the directors had knowledge of the fact, which, it is alleged, would invalidate the policy. This knowledge was not obtained by "mere rumor, or talk upon the street corners," but by the evidence of their own senses, and that three of the four had their attention expressly called to the effect of the change in the use of the building upon the policy of insurance. The cases are not agreed upon the question under discussion, but we confidently assert that no case can be found where such notice or knowledge, as has been shown in this case, was held insufficient to bind the corporation. *North River Bank v. Aymar*, 3 Hill, 262, 274, 275; *Porter et al. v. Bank of Rutland et al.*, 19 Verm., 411, 425; *Fulton Bank v. New York & Sharon Canal Bank*, 4 Paige, 126, 136; *Romayn v. Mich. Fire Insurance Company*, 1 Green (N. J.), 110; *The Bank of St. Mary's v. Munford & Tyson*, 6 Georgia, 44, 49. Proof that the corporation, sought to be charged with notice, took a newspaper in which the notice was published, is a fact from which the jury are authorized to infer actual notice to a corporation. *Green v. Merchants' Insurance Company*, 10 Pick., 402, 406; *Bank of South Carolina v. Humphreys*, 1 McCord, 388; *Martin v. Walton*, Id., 16; *Elton v. Larkins*, 5 Car. & P., 86; *Freire et al. v. Woodhouse*, 1 Holt, 572; *The New Hope and Delaware Bridge Company v. The Phoenix Bank*, 3 Com., 156; *Am. Law Reg.*, Feb., 1862.

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BALDWIN, C. J. — The defendants claim that they are not liable upon their contract of insurance, for the reason that the assured rented the building for a theatre, and permitted stage scenery to be introduced therein, in direct violation of the conditions of the policy; that by the introduction of "stage scenery," the risk became extra-hazardous, the fire facilitated thereby, and that the plaintiff should not recover. The plaintiff denies that there was any condition in the policy that was violated by the acts of the association in permitting such scenery, &c., to be introduced; that if the said policy was forfeited by a violation of its terms, that the defendant waived such forfeiture by recognizing its validity after such forfeiture occurred. It is claimed that the said building was used as a theatre, and stage scenery introduced, with the knowledge and assent of the officers of defendant, and after the building was so used, and with a full knowledge of such fact by the company, certain assessments were made and collected by defendant on the premium note of the assured. There are several assignments of error argued by counsel, that become of little importance from the view we take of the case.

The objection to the plaintiff's right of recovery, for the reason that notice was not forthwith given to defendant of the loss by fire, presents a question not raised in the court below, and cannot now be considered by us.

The instruction of the court as to the effect of the answer of the garnishee, that they were to give to it the same consideration as they should to the testimony of a disinterested witness, except in so far as such answer was based upon information and belief, was not such an error as to prejudice the defendant. Nor do we think the court erred in its instructions given, which directed the jury that the assessment and collection of a portion of the premium note, after the defendants were advised of a violation of the policy, was a waiver of the forfeiture. The correctness of this

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instruction, and the refusal of those which contained directly the opposite doctrine, has been determined by this court in the case of *Keenan v. The Mo. State Mutual Ins. Co.*, 12 Iowa, 126.

The controlling question in the case is, whether the defendant ever had notice of the violation of the terms of the policy prior to the fire, or when the assessments were made, by which it is claimed the forfeiture was waived.

The jury must have found that the defendant waived the forfeiture, as we think it is clearly established by the evidence that the introduction of "stage scenery" into said building was in violation of the conditions of the policy. Nor do we see how the jury could have found otherwise than they did, under the instructions of the court. The evidence shows that the President of the Insurance Company was present in the building when stage scenery was there used, that the opening of the theatre was announced by the public papers, and large notices posted up at the post-office, and at the public places in the city, that at a meeting of the directors of the Odd Fellows' Hall Association, part of whom were directors and members of the Insurance Company, the question was canvassed whether a lease to the Dramatic Association, and, as incident thereto, the introduction of "stage scenery," would be in violation of the terms of their policy of insurance. It is upon this knowledge that the jury must have concluded that the defendant was notified of the violation of the policy. The court refused to instruct the jury "that mere rumor, or that kind of knowledge which is acquired by an officer of a corporation in his individual capacity, is not sufficient to constitute notice to a corporation." "That notice of any fact material in any particular case, must be given by some person having authority to give notice of such fact, to some one having authority to receive notice." "That the knowledge that C. H. Booth, P. A. Lorimier and F. E. Bissell

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derived as officers of the Odd Fellows' Hall Association will not be evidence against the Dubuque Mutual Fire Insurance Company, or tend to prove that the said Insurance Company had any knowledge that stage scenery was or had been used in the building insured."

We think that the refusal of the court to give these instructions was error.

The knowledge that an officer acquires by rumor, or by information in his individual capacity, should not be considered as constructive notice to the company. Such officer may receive such information, without knowing how far it affects the rights of the company he represents. The policy, with its conditions, is not under his control, or in his possession, nor can he be required to retain in his mind the conditions of the insurance in each policy, so that, when he walks the street, stops at a business house, or attends a theatre or place of public worship, he is to take notice of the acts of persons insured, and report to the board of directors all he has seen or heard, so that the company may be advised whether their outstanding policies are being violated or not.

In the case of the *Fulton Bank v. N. Y. Sharon Canal Co.*, 4 Paige, 127, it was held "that the directors or trustees of a corporation when assembled as a board are the general agents of the corporation, and notice to them, when so assembled, is notice to their successors, and to the corporation. But notice to an individual director, who has no duty to perform in relation to the subject matter of such notice, is not a good constructive notice to the corporation."

In the case of the *National Bank v. Norton et al.*, COWEN, J., after citing the ruling of different courts upon this subject, says: "These cases show what is indeed quite plain, that the acts of a director, or other officer of a corporation, unless official or in respect to his agency, are no more operative as against the institution than the acts of any

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ordinary corporator, and these no more so than the acts of a stranger." See also *Farmers' and Citizens' Bank v. Payne*, 25 Conn., 444; *Bank of the United States v. Davis et al.*, 2 Hill, 451.

Reversed.

CONNELLY v. CARLIN *et al.*

1. ANSWER IN CHANCERY. A sworn answer in chancery is not evidence when it is not demanded in the petition. Following *Sheppard v. Ford*, 10 Iowa, 502.

Appeal from Dubuque District Court.

FRIDAY, JUNE 13.

BILL to set aside a sale made for the purpose of hindering, delaying and defrauding creditors. Decree for the plaintiff, and defendants appeals.

Clark and Beach and *Austin Adams* for the appellant.

Wilson, Utley & Doud for the appellees.

BALDWIN, C. J. — The only question in this case is, whether a certain conveyance, made by one Kearns to the respondent Carlin, was fraudulent. The complainant alleges that it was, and prays that the same may be set aside. The respondents answer under oath, and deny the allegation of fraud. It is claimed by appellant that the answer thus sworn to cannot be overcome by the testimony of one witness. Under the ruling of this court, in the case of *Shepherd v. Ford*, 10 Iowa, 502, a sworn answer to a bill in chancery is not evidence, unless called for by the complainant.

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The answer of respondents in the case, not being called for by the complainant, is not evidence, but only puts in issue the averments of the bill.

The testimony introduced by the complainant clearly establishes a fraudulent intent upon the part of the grantor, Kearns, in making the deed, and that Carlin knew it was not made in good faith when he purchased.

Affirmed.

13	384
107	415

BAKER V. KERR.

1. SERVICE OF NOTICE. A defendant cannot after he has by his own act, or the act of his attorney, recognized the validity of a service of notice upon his agent, object to the jurisdiction of the Court.
2. REVISION CONSTRUED: OPINIONS OF THE SUPREME COURT. The Revision of 1860, §§ 2636, 3546 and 3550, construed and explained.

Appeal from Fayette District Court.

SATURDAY, JUNE 14.

THE facts are sufficiently stated in the opinion of the court.

Wm. McClintock for the appellant.

Thos. Berkeley for the appellee.

WRIGHT, J. — This cause was affirmed at the December Term, 1861. Since then a petition for re-hearing has been filed, which we proceed to examine.

Defendant prosecuted his writ of error to reverse a judgment against him, rendered by a justice of the peace. The service of the original notice was upon a person styled "the agent" of the defendant. One Iliff, "as an agent and

attorney," appeared before the justice and made a showing that he had been employed by this "agent," thus served, to defend the action, and asked to be allowed to do so. Plaintiff objected, was sustained, and thereupon there was a judgment by default. In the District Court, on hearing the writ of error, the cause was reversed, and an order made remanding the cause for trial, after giving five days' notice to the defendant's attorney.

It is now objected that the justice had no jurisdiction; that the court erred therefore in remanding the case; that it should have been dismissed. We are very clear that this position is untenable. Defendant had, by his own act, or by the act of one whom he admits was his attorney, recognized the validity of the service upon him through his agent. And such service is good, under some circumstances. (§§ 2827, 3864.) There is no question but that the justice had jurisdiction over the subject-matter. And it was therefore perfectly competent, under § 2855, to remand the case for new trial, prescribing the notice to bring the parties again before the justice.

As to the objection that a notice to the attorney would not be sufficient, we say that it will be time enough to determine that when the question legitimately arises. The plaintiff may serve the defendant himself with notice, notwithstanding this direction of the court. Or it may be that no question as to the sufficiency of the service will be raised. This order is merely directory, and until the party has sustained some injury from it, we are not disposed to pass upon it as an abstract proposition.

Appellant's counsel in his petition, suggests that no written opinion was filed when the case was formerly decided, that such opinion was necessary before the case could be determined, and that the statutory requirements upon this subject should be complied with. And these suggestions demand, perhaps, at our hands a passing notice.

We are fully aware of the demands of the statute. These are, that the opinions of the court on all questions reviewed on appeal, shall be reduced to writing, and filed with the clerk (§ 2636), that the court must decide on each error assigned (§ 3546), and that no case is decided until the opinion in writing is filed with the clerk (§ 3550). And we are fully as conscious of the difficulty, if not impossibility, of literally complying with all these requirements, consistently with the due and speedy administration of justice, the proper and careful determination of all the causes submitted in this court. And, therefore, in view of the great press of business, in our anxiety to pass upon and adjudicate the causes submitted with as little delay as possible, we have felt at liberty, and indeed that it was our duty, to announce that a case was affirmed, without filing a written opinion, when it was unimportant, involved no new question, and when an opinion would be but repetition and tend to unnecessarily encumber our published reports. And while it is doubtless more satisfactory to counsel, to know, in each case, the grounds upon which a decision is based, it would hardly seem just or reasonable, nor to comport with the theory of our judicial system, that this wish should be gratified, if, as a consequence, we are compelled to hastily consider and determine the heavier and more important questions submitted. Very many cases are brought before us, involving no semblance of error, where, nevertheless, the errors assigned are numerous and oft-repeated (and as often decided previously), where to undertake to pass upon each in a written opinion would require as much time as to determine questions before undecided, of the greatest magnitude. And yet, by the literal reading of the law, this is our duty—a duty, however, which we have never supposed was demanded of us by the policy of the state, by the interests of parties litigant, or the candid and enlightened judgment of the bar.

And the correctness of this view, and of this professional judgment, finds full support when we remember that we are asked to examine and determine about five hundred cases annually, that, under our new system of practice, questions are constantly arising, requiring early settlement, in which written opinions are absolutely necessary, and that our published reports are accumulating, as in other states, almost, if not quite, beyond the public and professional demand.

The Constitution of Indiana requires that the supreme court shall give a written opinion upon every point arising in the record of every case. PERKINS, J., in *Willets v. Ridgway*, 9 Ind., 367, in commenting upon this provision, uses language, the substance of which we feel free to adopt in this instance. "If literally followed," says the judge, "it tends to fill our reports with repetitions of decisions upon settled as well as frivolous points, and often to introduce into them, in the great press of business, premature and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good English. But though this provision is not to be disregarded, it is to be observed according to some construction, and should receive such a one as to obviate its inconvenience and objectionable character, as far as consistently can be done.

"It often happens that a point is raised, involving an important principle, but of minor consequence in its bearing upon the particular case, while it presents the material question in some other pending cause. Now, to decide it in the case where, from its subordinate position, it is but carelessly argued, by one side or the other, if at all, and hence, perhaps, but hastily considered by the court, is unjust to counsel whose subsequently pending cause is thus prejudged, without their being heard, and upon an argu-

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ment on which they would be unwilling to rest it. It is this class of decisions which form the bane of judicial reports.

"These and other considerations have led the court to inquire, when does a question, in the sense of the Constitution, arise in the record?

"We do not think it does so merely because it is raised by counsel, nor because it is presented by the assignment of errors. Nor, necessarily, because it is raised by a bill of exceptions. It must be a question the decision of which is necessary to the final determination of the cause, and which the record presents with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings."

With the spirit of these views, as well as the provisions of our statute, we shall, as heretofore, endeavor to comply. If, at any time, there is a seeming departure, it will be with a consciousness on our part that the particular case has received none the less of our care and attention, and that neither parties litigant, counsel, or the public, can have just cause of complaint.

The re-hearing is refused.

THE STATE OF IOWA, *ex rel.* THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY, v. THE COUNTY OF WAPELLO.

1. RAILROAD SUBSCRIPTION BY COUNTIES. The Legislature of the State of Iowa has no power to authorize counties to become, as corporations, stockholders in Railroad Companies; and has never attempted, by the

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provisions of § 114 of the Code of 1851, or otherwise, to confer such power; overruling *Dubuque County v. The Dubuque and Pacific Railroad Company*, 4 G. Greene, 1; and approving *Stokes v. The County of Scott*, 10 Iowa, 166.

2. **SAME: STATUTES CONSTRUED.** "An act regulating interest on City and County bonds," and "An act regulating the issue of county and corporate bonds," both of which were enacted on the 25th day of January, 1855, regulated the exercise of a power which it was supposed had been already granted; but neither of these can be construed as an original grant of power.
3. **RAILROAD CORPORATION.** A railroad corporation in this State is a voluntary association, self-organized under a general incorporation act, and is invested with the privileges and franchises which belong to other joint stock companies.
4. **BILL OF RIGHTS.** The bill of rights, in the Constitution of the State of Iowa, will not be so construed as to exclude, impair or deny any rights not enumerated therein, and retained by the people.

Appeal from Wapello District Court.

MONDAY, JUNE 16.

MANDAMUS to compel the issuing of bonds by Wapello County, in payment for stock subscribed in the Burlington and Missouri River Railroad Company.

The facts are stated as the opinion of the court.

D. Rorer for the appellant.

The subscription was made under the old Constitution and under the Code of 1851. The county is a corporate body, and the county judge and court are the agent of such corporate body. The acts of the judge and court judicially performed, are not only the acts of an authorized agent of the county, with power to contract, but are *res adjudicata* and binding, when made on a subject matter *prima facie* within the jurisdiction of said court; therefore, a construction of the road making power conferred by the statute, as applying to railroads, is, until reversed,

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binding on the county; and especially so when acted on by other parties. Code of 1851, §§ 98, 103, 106, 114-116. For these enactments, there is ample authority in the Constitution. Art. 8, § 2.

The county judge was authorized to cause a vote to be taken as to the appropriation of money to construct roads and to take stock in such roads. The term roads here used, is not limited by restraining language, as county roads, plank roads, railroads, township roads, but is used in the broadest sense, and includes railroads; unless a railroad is not a road. A judicial construction has been given to the statute by the agent of the county, and it is *res adjudicata*. *Hopkins v. Lee*, 6 Wheat., 109; *Bank of the United States v. Beverly*, 1 How., 134.

The continuous and contemporaneous decisions of this court, affirming the power, and the acts of the General Assembly of 1854-5 (see pp. 192 and 219); emanating from the two highest departments of the government, from powers representing the counties as parts of the whole State; under which this contract, and these investments were made, do estop the county, as a person in law, from denying the binding force of the contract. *Dubuque County v. Dubuque and Pacific Railroad Company*, 4 G. Greene, 1; *The State of Iowa v. Bissell*, Id., 328; *Clapp v. Cedar County*, 3 Iowa, 15; *Ring v. Johnson County*, 6 Iowa, 265; *McMillan v. Boyles, County Judge*, Id., 304; *Stack v. Maysville and Lexington Railroad Company*, 13 B. Monr., 1; *Cincinnati and Zanesville Railroad Company v. County of Clinton*, 10 Ohio, 77; *Justices of Clark County v. Turnpike Co.*, 11 B. Monr., 143, 156; *Aspinwall et al. v. The Commissioners of Davies County*, 22 How., 365; *The Commissioners of Knox County v. Aspinwall et al.*, 21 How., 539; *Graham et al. v. Maysville et al.*, 6 Am. Law Reg., 92; *McCoy v. Washington County*, 7 Am. Law Reg., 193; *Mygatt v. The City of Green Bay*, 8 Am. Law. Reg., 271; *Seeley v.*

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The City of Racine, 8 Am. Law Reg., 608; *Sharpless v. The Mayor of Philadelphia*, 21 Penn. S. R., 147.

The construction of a railroad is as much a matter of public interest, and is as fully within the statute conferring the power to make roads as is the construction of any road. It matters not that the work is performed by a private corporation or person, and with private capital. The road is a great public highway, and the company constructing or running it, are the mere agents of the public, for the management and care of the easement, which is in the public. *Beekman v. The Saratoga and Schoharie Railroad Company*, 3 Paige Ch., 45; *Louisville, Cincinnati and Charleston Railroad Company v. Chappell*, 1 Rice, 388, 400; 8 Am. Law Reg., 129; *Bonaparte v. The Camden and Amboy Railroad Company*. 1 Baldwin C. C. R., 205.

James Grant, of counsel in several causes pending in the Supreme Court for parties holding the bonds of counties issued in payment for stock taken in Railroad Companies, submitted an elaborate argument in support of the validity of such bonds, which was considered by the court in the determination of this cause. He reviewed:—

I. The history of the legislation and judicial opinions of the Supreme Court of Iowa on this question; citing Code of 1851, §§ 114, 670. Acts of 1854-5, pp. 192, 219. *Dubuque County v. The Dubuque and Pacific Railroad Company*, 4 G. Greene, 1; *The State v. Bissell*, Id., 328; *Clapp v. Cedar County*, 3 Iowa, 15; *Ring v. Johnson County*, 6 Id., 285; *McMillan v. Boyles*, County Judge, 6 Id., 304; *Gaines v. Robb*, 8 Iowa, 199; *Stokes v. Scott County*, 10 Id., 166; *Whittaker v. Johnson County*, Id., 161.

II. The question as determined in other judicial tribunals, 2 Kent, 310, and the cases there cited, *Raleigh & Gastin Railroad Company v. Davis*, 2 Dev. & Batt., 451; Walker's Am. L., 76, *The People, ex rel. Wood, v. Draper*, 15 N. Y., 548; *Goddin v. Crump*, 8 Leigh, 120; *Harrison*

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Justices v. Holland, 3 Grat., 247; *Bridgport v. The Housatonic Railroad Company*, 15 Conn., 475; *Nichols et al. v. The Mayor of Nashville*, 9 Humph., 252; *Louisville and Nashville Railroad Company v. Davison*, 1 Sneed, 637; *Cotton v. The Commissioners of Lion*, 6 Fla., 610; *Talbot v. Dent*, 9 B. Monr., 526; *Stack v. Maysville and Lexington Railroad Company*, 13 B. Monr., 1; *Maddox v. Graham & Knox*, 2 Metc., 56; *Shaw v. Dennis*, 5 Gilm., 405; *Ryder v. Alon & C. R. R.*, 13 Ill., 576; *Lawyer v. The City of Alton*, 3 Scam., 130; *Mason v. Hart et al.*, 4 Scam., 134; *Prettyman v. The Supervisors of Tazewell County*, 19 Ill., 406; *Johnson v. Stark County*, 24 Ill., 75; *Thomas v. Leland*, 24 Wend., 65; *The People v. The Mayor of Brooklyn*, 4 Com., 419; *Grant v. Couster*, 24 Barb., 232; *Clark v. The City of Rochester*, 24 Barb., 446; *Bank of Rome v. The Village of Rome*, 18 N. Y., 32; *Commonwealth, ex rel. Dysart, v. McWilliams*, 11 Pa. S. R., 61; *Sharpless v. The Mayor of Philadelphia*, 21 Id., 147; *Moore v. The City of Reading*, Id., 188; *Commonwealth v. The Commissioners of Allegheny*, 32 Id.; *Griffith v. Crawford*, 20 Ohio, 609; *Cincinnati, Wilmington and Zanesville Railroad Company v. Clinton County*, 1 Ohio State, 77; *Cass v. Dillon*, 2 Id., 607; *The State v. Van Horn*, 7 Id., 301; 8 Id., 401; *Stien v. The Mayor of Mobile*, 24 Ala., 591; *Taylor v. Newbern*, 2 Jones' Eq., 141; *Police Force v. The Succession of McDonough*, 8 La. An., 341; 11 Id., 649; *Parker v. Scogin*, 1 Id., 119; *St. Louis v. Alexander*, 23 Mo., 483; *Strickland v. The Mississippi Railroad*, 21 Miss., 209; *Aspinwall v. Commissioners of Knox County*, 21 Howard, 539; *Zalinske v. C. C. & R. R. Co.*, 23 How., 381; *Mygatt v. The City of Green Bay*, 8 Am. Law Reg., 28.

III. The moral aspect of the questions; citing *Commonwealth v. Commissioners of Allegheny County*, 32 Pa. S. R., 285; *The State v. Van Horne*, 7 Ohio, 331; *The State v.*

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The Trustees of Union Township, 8 Ohio S. R., 401; *The State Bank v. Hunter*, 1 Dev., 125.

Knapp & Caldwell and *J. F. Wilson* for the appellee.

No written or printed argument was found on file.

Parker & Edwards being of counsel for some counties resisting the collection of interest coupons attached to railroad bonds, submitted an argument which was considered by the court, reviewing the judicial history of this question as presented by the decisions of the Supreme Court in the cases above cited; and contending that the question has never been finally settled, and that *stare decisis* does not apply. In support of the proposition that such bonds and coupons when void in their inception cannot be rendered valid by a transfer to third parties, they cited *WOODWARD, J.*, in *Stokes v. Scott Co.*, 10 Iowa, 166; 2 Par. Cont., 252; 12 East, 304; *Edward's Prom. Notes*, 337; *Edwards v. Docie*, 4 Barn. & Ald., 212; *Smith v. Strong*, 2 Hill, 24.

LOWE, J.—On the 24th day of September, 1853, a special election was held in the county of Wapello, agreeably to a notice previously published by order of the County Judge, for taking the votes of the qualified electors in favor of, or against, the proposition for said county to subscribe \$100,000 to the capital stock of the Burlington and Missouri River Railroad Company, to be paid in the bonds of said county, redeemable in twenty years, bearing an interest not exceeding 8 per cent, payable annually, to be issued upon the call of said Company, in installments not exceeding 5 per cent per month. Said election resulted in casting 1,067 votes in favor of, and 208 votes against, the subscription. In accordance therewith the County Judge subscribed 1,000 shares of \$100 each, and afterwards responded to the first six calls, by issuing and delivering to said company the requisite number of bonds to the

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amount of thirty thousand dollars. Due notice of all the other calls covering the residue of said subscription was given, but not observed; and finally the further issuing of bonds in payment of said stock was refused; and thereupon on the 30th day of March, 1859, an information was filed upon the relation of said railroad company, asking for a writ of *mandamus* to compel said county to issue its bonds for the balance of the unpaid stock. This information was dismissed by the court, upon the demurrer of the defendant, alleging, in substance, as the ground thereof, that the said railroad subscription on the part of the county and its agents was not only without the authority of law, but in violation of the Constitution of this State.

The record of the proceeding is now before us, presenting the same question in all its unrelieved force and perplexity, to be decided, we trust, upon principle, rather than upon authority. The supreme tribunals of some fourteen or fifteen States have expressed their opinions upon the exercise of this power by municipal corporations, without reaching, strange to say, conclusions that are satisfactory to the inquiries and consciousness of the public heart. And hence the renewed agitation of the subject, which, doubtlessly, will continue to obtrude itself upon the courts of the country, year after year, until they have finally settled it upon principles of adjudication which are known to be of the class of those that are laid up among the fundamentals of the law, and which especially will leave the capital of private individuals where the railroad era, when it dawned upon the world, found it, namely, under the control and dominion of those who have it, to be employed in whatever field of industry and enterprise they themselves may judge best.

The question, as presented by the records in this case, assumes a duplex form, and is to be considered under two aspects:

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First, whether at the time this subscription was made, the Legislature had conferred upon the counties of this State the power of subscribing to the capital stock of railway companies; if so, then, secondly, whether it was competent for the Legislature to pass a valid act giving such power.

The first division of the subject presents no new question in this State, or in this court.

The first adjudication upon the same was in the case of *Dubuque County v. The Dubuque & Pacific Railroad Company* (4 G. Greene, 1), where it was held by a majority of the court that the power had been conferred by § 114 of the Code of 1851, was followed in its enunciation by a very clear and able dissenting opinion from Judge KINNEY.

The last decision by our predecessors was in the case of *Stokes et al. v. The County of Scott*, (10 Iowa, 166,) where it was held that this power had not been conferred.

The intermediate decisions were an acquiescence in the former of these, by two members of the court, not upon the ground that the Legislature had in fact authorized the exercise of any such power by the cities or counties in this State (for about this they had expressed very great doubts, and affected not to believe it), but because they felt themselves so much committed and trammelled by the previous decision and subsequent legislative recognition, that they did not feel themselves at liberty, from public considerations, to unsettle the construction which the first decision had given to the Code on the subject.

In this aspect of the case it will be perceived that the question now under consideration is an entirely open one in this State, and that this court as now constituted must pass upon it as an original question, wholly unaffected by the doctrine of *stare decisis*; or, if influenced at all by prior decisions, we should be inclined to follow the later rather than the earlier opinions.

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The subject of railroad subscriptions by cities and counties in their corporate capacity has elicited a vast amount of legal and speculative discussion, not only in the courts of the country, but outside of the courts, among the legal profession and in our law journals; and it may be remarked, however widely the parties mingling in these criticisms and discussions have differed upon some points, there is one question inseparably connected with the subject, about which there is and has been no disagreement whatever; and that is, that municipal corporations under no circumstances can exercise such a power, in the absence of an express grant from the General Assembly of the State.

This would seem to be a concession *in limine*, that it is, to say the least, an extraordinary power which does not reside inherently in, pertain naturally to, form an incident of, or fall within the scope of, the powers usually exercised by such corporations.

The subscription in this case was taken or attempted to be taken by the county of Wapello in the year 1853. Its authority for doing so, if any it had, is claimed to have been derived from § 114 of the Code of 1851.

WRIGHT, C. J., who prepared the opinion in the above case of *Stokes et al. v. The County of Scott*, showed how utterly unfounded was and is this assumption. And upon this particular point in that case the court was a unit. WOODWARD, J., dissenting on other grounds, used the following language with reference to the power being derived from § 114 aforesaid:

"If the power exists, it must have some other foundation. But this is a subject on which change is disastrous. It is one on which we are bound by former decisions. It would not be possible for a judicial opinion to indicate more clearly what would be the view of the court, if it were untrammelled by previous decisions and legislative action, and were free to express its opinions. So far as regards the

existence of the power, true, under the law as it now is, I agree with the Chief Justice, and have so agreed from the time the first case was presented."

In the case just referred to, the then Chief Justice showed that such a construction was not only unauthorized by the spirit and the language of the section in question, but proved affirmatively, from the journals of the General Assembly, that the Legislature absolutely intended, and did expressly withhold from the counties of the State the power to subscribe to works of internal improvement.

He demonstrated it in this way: The Code Commissioners in making their report to the Legislature, presented that part of § 114 that bears upon this point in the following form:

"The County Judge may submit to the people, at any regular election, * * * * the question whether money may be borrowed to aid in the erection of public buildings, whether the county will construct, or aid to construct, any road or bridge which may call for an extraordinary expenditure, *whether the county will subscribe to any work of internal improvement, &c.*"

This last clause, after days of discussion, was stricken out, as an unwise and inexpedient provision. At the next succeeding session of the Legislature a second attempt by the friends of internal improvement, was made to have the power conferred upon the counties, but without success. After these two affirmative acts on the part of the General Assembly to withhold the power, there is no ground left upon which to raise a doubt in regard to the real meaning and object of the above section.

That no improper or extended construction should be given to the word *road*, the Legislature took the precaution, in § 26 of the Code, to define the sense in which it was to be used, limiting its meaning to that of an ordinary "county road," "common road," or "state road." Now

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we have an abundance of judicial authority for saying that a railroad is neither of these, for it has been held, both in England and in this country, upon principle as well as upon authority, that the construction of a railway over lands already taken for a public highway, is an additional servitude upon the land, and entitles the owner to additional compensation for right of way; and that, upon this ground, the use of land for a railroad is vastly more onerous and detrimental to the owner of the fee. 4 Cush., 63; 9 Indiana, 433-467; 8 Dana, 289.

The great marvel is, that this fragment of legislative history should have escaped the notice of our predecessors who first gave a construction of this section of the Code. Of course, we are not at liberty to suppose for an instant, that with a knowledge of these facts, they could have adopted a construction so utterly at variance with the known and declared intention of the Legislature; yet that it is so, there remains not the shade of a doubt.

We inquire, then, whether the want of authority on the part of the county of Wapello to make this subscription, has been cured or legalized in any way by subsequent legislation. On the 25th of January, 1855, the Legislature passed two acts, one to the effect that city and county railroad bonds should not draw a greater interest than ten per cent, but that they might be sold by the company at such discount as may be deemed expedient. The other limiting the time within which said bonds should be issued, and requiring the proceeds thereof to be expended within the county issuing them. It cannot be said that either of these acts confer the power in question, nor do they, upon their face, purport to legalize the power where it has been exercised in the absence of any such grant. He would be a bold jurist who could affirm that they were anything more than a *regulation* of a grant or power already supposed to be existing.

Upon what ground, then, can the county of Wapello be compelled to issue and deliver to the company these bonds in payment of its subscription? Great stress is justly placed upon the fact that, after all, § 114 of the Code, under the authority of which a majority of the people of Wapello county voted to subscribe the stock, is open to construction, and inasmuch as the highest tribunal of the State has construed it to confer the power, and by reason of which construction a large number of bonds have already issued and passed into the hands of innocent holders, therefore a change of construction would now be an unjustifiable interference with vested rights. It must be remembered, however, that we are considering this question at a point of time when the force of this objection has suffered much abatement, from the fact that the responsibility of this change has already been incurred by our predecessors, so far as it affects two members of this court, and that we are not at liberty wholly to thrust aside the obligation laid upon us of considering the last as well as the first of these judicial constructions. Hence with us it becomes in the main a question of the first impression. Nevertheless, the writer of this opinion is not insensible of the great strength of this position, and he is free to admit that if the question before us involved no other principle than that of a right construction of a statutory enactment, he could not be persuaded to disturb adjudications under which large interests have been acquired. But, unfortunately, in his opinion, this case does raise a question of much graver import, which goes back of the statute, and which must find its solution in the personal conscience and judgment of each court, in view of its connection with, and bearing upon, the great fundamental and reserved rights of the citizen.

This brings us to another and much more important branch of this subject, which has chiefly for its consideration, the question whether the Legislature can, under any

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circumstances, pass a valid law which will make it lawful for a county or city in its corporate capacity to subscribe stock in a railroad company.

The consideration of this proposition naturally refers itself to the true theory of our State government, the nature of municipal, and the character and responsibilities of railroad corporations. If we can ascertain the relations between these several corporate bodies, and the inherent elements of power on which each is founded, we may be able to deduce the principle that ought to govern in determining the question in controversy.

We commence the examination of this subject, first, with what we understand to be some of the leading features or characteristics of a railroad corporation, under the laws of this State, together with the rights, obligations and responsibilities of those who become stockholders in such corporations, in order to exhibit the bearing and judicial effect of a county railroad subscription upon the rights of individuals, for the lawfulness of such subscription must depend much upon the question whether the reserved rights of the citizen are or are not injuriously affected thereby.

1. A railroad corporation in this State, is not created by a special charter granted directly from the legislature, but is a voluntary association, self-organized, under a general incorporation act, which confers upon them the ordinary privileges and franchises that belong to other private joint stock companies.

The general act just referred to, the object as well as the mode of accomplishing that object, the law that regulates their conduct, establishes their rights, and fixes their duties and liabilities, show very conclusively that these corporations or extended partnerships, are essentially private and not public; that they are associated capital in aid of private industry and enterprise, directed, to be sure, in this instance, to works of internal improvement, but only as &

means to an end, which end is the making of pecuniary profit in the business of common carriers.

Then, again, the authorities showing such companies to be private corporations are numerous, many of which will be found collected in a note by Redfield on Railways, page 5.

2. They are contracts between the State and the companies which cannot be affected by subsequent legislative interference; no power of modification, change or repair, having been retained in the law authorizing their formation: 2 Kent, 272, marginal. Subject to this qualification, they are, nevertheless, under the control for certain purposes, and to a limited extent, of the General Assembly of the State.

3. They are voluntary, — the condition of membership being the payment of a certain amount of stock freely and without violence offered to the will. It will not be, as it has not been contended by any one, that the corporation itself, or any other power in the government, can resort to any compulsory process to compel an individual citizen to become a member of such associations. Like all other contracts, to become a party thereto must be a matter of absolute personal choice.

4. The officers of these corporations are elected, and business matters which turn upon a vote, are all determined upon a principle totally different from the elective franchise as it exists under the laws of the State. Each member is entitled to a vote for every share of stock he may own, making thereby the amount of capital invested by each member, instead of the number of individual votes, the basis of representation in regulating and controlling all its business operations and interests.

5. The final cause or object of these moneyed associations is to engage in and carry on the business of common carriers. That they are such, see Redfield on Railways, 234.

It is said to be an elementary principle of law that all who carry goods or persons for all who apply, are common carriers; and as this is the thing which railway corporations hold themselves out to the public to do, it follows that they stand before the world in this attitude, charged with all the hazards and extraordinary responsibilities which attach themselves to this relation, subject to the same laws which control the action and fix the liabilities of all other classes of common carriers.

It is proper, in this connection, that we should allude to the nature and extent of some of these risks and liabilities.

They are insurers for the safe and speedy transportation of goods, freight and baggage. This covers every description of loss and damage, not occasioned by the elements, and the enemies of the country. They are responsible for the greatest care for the safe transit of their passengers, and answerable for the smallest negligence by which death or personal injuries ensue, or other detriment to third persons and domestic animals. These risks are the more imminent for the reason that these companies are necessarily compelled to employ a large number of servants and agents, for whose laches on the one hand, and promptness and fidelity on the other, they are responsible.

These characteristic outlines of a railway stand in marked contrast with those of municipal corporations. The latter are public, not private, political not trading and speculative, corporations. They have no contract functions to be impaired, or faith to pledge. They exist simply at the will of the legislature, subject to be altered, extended, or blotted out of existence. They are sometimes styled quasi-corporations, because they do not possess all the incidents that belong to corporations that have been organized for commercial, manufacturing, trading, and the various details of internal improvement.

In other words, they are invested with corporate attributes *sub modo*, that is, for special ends and local necessities. They may be said to occupy the place of intermediate agencies or instruments of government, standing between the people and the sovereignty of the State, for the purpose of devising and executing certain local police regulations which it would be inconvenient, if not, indeed, impracticable in some instances, to do directly by the legislature. Their powers are all derived, and being purely civil and political, they cannot overstep the boundary that limits their true municipal province.

Almost from the necessity of the case, municipal corporations must move in their appropriate, and prescribed orbits, outside of which they have no privileges, nor can they legitimately exercise any power or superintendence—unless in a few exceptional cases, touching guarantied regulations, the supply of water to cities, &c. These objects, promoting alone the comfort and health of those within, are strictly municipal, although the money to be expended, and the means to be employed in securing them, may be external to the chartered limits of the city.

The condition of membership in these corporations is not that of the payment of a given sum of money, but simply a residence therein, under the implied obligation, however, that such resident will yield a submission in obedience to their police regulations, and share their just proportions of the burdens imposed in the execution of their various trusts. These burdens come in the form of taxes, to levy which is, to be sure, an attribute of sovereignty, but, under the peculiar plan or economy of our State government, is shared in, to a limited extent, by counties and cities, and even school districts. To these several quasi-corporations are confided distinct trusts; they move therefore in spheres separate and distinct from each other. If a School district should levy and attempt to collect a tax

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foreign to the objects of the common school system, the act by common consent would be pronounced invalid. If a city should tax its inhabitants to build a court house for the benefit of the whole county, or to defray the expenses of the district court, the act would encounter at once the resistance of such inhabitants as unjust and unequal.

It will also be conceded that counties in exercising the taxing power must be restricted to purposes alone municipal and local. The citizens of a particular county cannot be taxed separately for an object in which the public at large is generally interested, nor, on the other hand, should the whole State be taxed for an object partial, and limited in its benefits to a single county. Chancellor KENT in his Commentaries, vol. 2, 331, expresses the true doctrine on this subject when he remarks: "Every person is entitled to be protected in the enjoyment of his property, not only from invasion of it by individuals, but from all unequal and undue assessments on the part of the government. * * * * The citizens are entitled to require that the Legislature itself shall cause all public taxation to be fair and equal in proportion to the value of the property, so that no one class of individuals, and no species of property, may be unequally or unduly assessed."

All this the people of this country very well understand, and have readily acquiesced in the taxing power without complaint, as it has generally been exercised. Nor has there been much conflict of opinion respecting what are, and what are not, legitimate objects of municipal regulation and superintendence, until cities and counties began to involve their citizens in heavy liabilities by subscribing in their corporate capacities, stock in railway companies. This, from the beginning, has been regarded by many as an alarming innovation upon the rightful province of these corporations, and, as a consequence, has been the fruitful source of much legal controversy. It is admitted that, as

the counties have been heretofore constituted, as instruments of government they could not lawfully make such subscriptions without an additional special grant of power from the Legislature to enable them to do so. This, at the threshold, proves the power to be preternatural. In our judgment it is more,—it is wholly unjustifiable, and is not, and cannot be, derived from the revenue power of the county, at all. Why? Because county revenue must be paid into the county treasury. There is no other depository where it can lawfully go, or be placed. When there, it must be under the control and disbursements of the county agents. No other authorized agencies or officers have a right to touch it. Then, again, it must be applied, through the regularly constituted agents, to public and not to private objects,—that is to say, to matters pertaining to the internal policy of the county, in which all its citizens have a common interest.

Now what is the case with a railroad subscription? As a matter of form it is called a tax, and as a matter of convenience it is collected by the same process as county revenue. But is it treated as county revenue after it is collected? Does it go into the county treasury? Is it collected and paid out by county agents, for county purposes? The fact is, the county has nothing to do with it after its collection; it is applied in payment of the railroad subscription, goes into the treasury of a private railroad company, is alone controlled and paid out by its officers for purposes pertaining to their own private schemes of trade and speculation. To call it, under such circumstances, a county tax, is simply a solecism in language. The true test to determine the character of a particular fund is the use to which it is to be applied and not the name that may be given to it, as a pretext for raising the same under the cover or pretense of a tax.

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If, then, a county railway subscription cannot be legitimately based upon and paid out of the county revenue, the power to make the subscription must fall to the ground—for, if the right exists at all, it must be deduced from the taxing power, not only as it is exercised in the mode of its collection, but in its custody, management, and application to the local necessities of the county. We are not unadvised of the answer which the Kentucky, Ohio and some other courts have usually made to this view of the subject. At the proper place we will state the substance of that answer, and the reason why it fails to be satisfactory to us.

As yet we have only developed, in part, the principle involved in the subject of this controversy.

Having already stated the most striking characteristics of railway and municipal corporations, in order that we might be able more clearly to bring out in appreciable relief the practical bearing which county subscriptions have upon the reserved rights of protesting citizens, we will endeavor to complete the picture, by running out a little more in detail, some of the consequences flowing from such a relation.

It must be remembered that when counties subscribe stock in a railway company they take upon themselves the duties and responsibilities common to all other stockholders; that they subject themselves, not only to the law that governs private corporations, but the by-laws and regulations that may be adopted from time to time for the government of the company, and to that extent it presents the anomaly of a public corporation, possessing some of the attributes of a government, subordinating itself to the behests of a private joint stock company formed for the purposes of trade and pecuniary profit.

Not only so, but the county embarks itself with all its citizens, in the hazardous business of common carriers, with

all its stern and extraordinary liabilities; so that the two hundred unwilling citizens of Wapello county who protested against changing their business relations, will not only be compelled to pay their proportional part of the capital stock to launch the enterprise, but must necessarily incur the risk and the expense of carrying on the undertaking as long as they reside and hold property in the county, or the Company continue *in esse*. We have already alluded to the nature and stringency of the duties and responsibilities of common carriers. The liability of the citizens of Wapello county, for losses, failures, accidents, damages, resulting from the negligence of railway servants, is not limited to their own county, for these things, but wherever they may occur along the whole line, from the Mississippi to the Missouri river.

Still more, if the railway company, of which the county of Wapello becomes a stockholder, should form a running connection with other distinct lines, stretching across the continent to the Atlantic coast, and should sell tickets, and check baggage for, or over, the route, which is now usually done, it has been held that an action will lie against either company for loss of baggage and detriment to passengers. 4 Seld., 37; Redfield on Railways.

If a loss occurs anywhere upon this continuous line, the citizen of Wapello county may be made liable for his fair proportion of the same. These losses are frequent, and sometimes exceedingly heavy.

If the Burlington and Missouri R. R. Co. should be sued and held liable, the county of Wapello, like individual stockholders, is bound, under certain contingencies, by the laws of this State, to pay her proportional share of such losses out of her separate property. See § 689 of the Code of 1851. This section, to be sure, is now modified by the Session Laws of 1858, chapter 119, so as to limit the individual liability to the amount of stock held by such member.

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Subject to this section, as thus modified, it is competent for the company, it is true, to exempt the private property of its members from liability for corporate debts. In the case before us, the plaintiffs have done this in adopting their articles of incorporation. But it was equally their right to have organized their Company upon the individual liability basis, and it is made their duty, under § 678 of the Code, in publishing a notice of their organization, to state whether private property is to be exempt from the corporate debts. It is believed by some that this they may do yet, if they choose, by altering the articles of incorporation, and fixing the individual liability of their members within any prescribed limit or maximum.

Whether they shall ever exercise this right, is immaterial to this argument. The fact that they have the power to do so, and may exercise it, and the further fact that under the provisions of § 689, above referred to, they may be held individually liable under the contingency therein specified is sufficient to exhibit the principle we are trying to develop. We will suppose, then, that the contingency in question does happen, and a large judgment is obtained against the Burlington and Missouri R. R. Co. for some of the thousand losses and accidents for which, as common carriers, they are liable. This judgment should be satisfied out of the corporate property of the company. But all know that this property, as a matter of necessity, and not generally from any fault of the company, is ordinarily covered with mortgages, given to raise money for the construction of the road, and cannot be reached by execution. The consequence is, that each stockholder, in the case supposed, is liable to an amount equal to the stock he has invested. Where a county, in its corporate capacity, has taken stock in a railroad, we suppose it will have to pay its proportion of this judgment, in the same manner that the original subscription was paid, by a tax levied upon the property

of each citizen, in proportion to the assessed value thereof. If any citizen of the county, having property, refuses to pay the contribution assessed upon his property, he may be coerced to do so by a forced sale of the same.

Now, when he pays this money, who gets it? Does the county? Is it applied to any local or municipal purpose in which the people of the county have a common interest? By no means. It is not even applied to any purpose connected with the construction, repair, or maintenance of the railway, the building of which was made the pretext or foundation of the original subscription. It goes into the pockets of a private individual, for an injury or loss which he had sustained as passenger, or as a consignor of goods, on a railway operated by the company as a common carrier. In other words, the payment of the money is due alone to the fact that the party paying it is engaged in the business of a common carrier, and has incurred a liability incident to that business, which the law requires should be liquidated. Such a liability is the necessary and legal consequence of the relation which he holds to the business community as a common carrier. If his property can be taken to pay losses of this description, that proves beyond doubt the existence of such a relation.

I have shown by the laws of this state, that, under certain circumstances, the individual property of the citizen of Wapello county, can be taken to pay the debts of this company, growing out of their responsibilities as carriers.

Now, how did the two hundred citizens of Wapello, who voted against the railroad subscription, come to hold this business relation with the public? By their own choice? The result of their own untrammelled will? We have seen that it was not. The only answer that can be given to this question, is, that it was in consequence of an act of the Legislature, conferring the power on the county of Wapello

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to subscribe, in her municipal capacity, stock in a railroad company. Nothing can be clearer to the mind of the writer of this opinion than that the exercise of this power and freedom in the choice of pursuits cannot stand together. If such a law can be upheld as a rightful exercise of legislative power, then the reserved rights of the citizen, as well as the guaranties of the Constitution, are all a myth.

That the Legislature could pass a law which would compel each property holder in the county to take one or more shares in a railroad company, none will pretend. Why? Because such a law would strike not only at the principle of property, but would be a wholly unjustifiable constraint over the minds of men in the choice of their business pursuits. Yet between such a law, and the one we are discussing, there is no difference in their practical effect. For, under either law they are alike made parties to a contract against their will, embarked in a business not of their own choosing, required to pay, perhaps, about the same amount of money as capital stock, and subject to the same liabilities as carriers.

If there is any difference, the law we are considering is the more objectionable of the two; for the citizen who is implicated as a quasi-member in the operations of a private joint stock company, through some mystical relation which he sustains to the county as a body politic, he has no personal control or voice in the management of the business of the company, whilst his responsibility for mismanagement is or may be personal. Not only so, but should he grow weary of the enterprise, and would fain dissolve his connection therewith, he cannot sell out as could an individual stockholder, nor buy himself off, nor give away his interest in the concern in order to avoid further responsibility. His only alternative to effect such an object, is to abdicate his home, sell his property, and remove from the county.

Now, we desire to ask upon what principle this legislative interference with the business pursuits of men can be justified. We are told that county and city railroad subscriptions have been upheld as valid by the courts of all the States where the question of their validity has been raised. Granting this to be true, yet these decisions have been made in many instances by divided courts, and they have failed to compose the doubts of multitudes of professional and unprofessional men, who affect to believe that they are at war with natural justice.

Again, we do not feel at liberty to adopt these adjudications unchallenged, for the reason that they have all been made with special reference to the statutory and constitutional law of their respective localities. This prudence we feel bound to imitate, for it is possible they may be right, and still the exercise of the power under the laws and Constitution of this State, be wholly unauthorized. Nevertheless, we wish to look a little into the foundation of this power as it has been presented by a number of the courts, as well as some of the more prominent grounds upon which its exercise is predicated and justified.

First. It is claimed that the General Assembly of a State possesses all legislative authority not delegated to the General Government, or prohibited by its own Constitution; that the bill of rights, as enumerated in the Constitution, must be referred to as the basis of judicial decision; that it is not in the power of the court to enlarge this list of rights; that such extension would involve an alteration of the instrument; that if the court can add to the reserved rights of the people, they can also take them away; that outside of the rights enumerated in the Constitution lies a vast field of power not reserved, prohibited, or given away, over which the Legislature has full and uncontrolled sway; that their use of this power is only confined by their discretion, and not the subject of judicial animadversion.

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This argument is based upon the idea that inasmuch as the Constitution withdraws from legislative interference, a certain specified list of rights, without any allusion to, or recognition of other reserved rights, that therefore these others, if any there may be, are not within the protection of the courts, but must be redressed, if abused, by arguments addressed to the Legislature itself, and not to the courts.

The soundness of this interpretation of a Constitution framed in the manner suggested in the argument, need not be denied or affirmed by us, for the reason that we must view this question of legislative power from the stand-point of our own State Constitution.

The Constitution of Iowa seems to have been written upon entirely a different theory, and utters quite another language, the words of which must furnish the only criterion by which we are to determine the rightful exercise of a given power. The first article of our Constitution contains an enumeration of certain fundamental rights; but it also contains a positive negation of the presumption that this specified list excludes the existence of others, for the last section of this article declares that "*this enumeration of rights shall not be construed to impair or deny others, retained by the people.*"

The object of this saving clause, we suppose, was to guard not only against the above construction given to bills of right, not containing any such reservation, but to bring these unenumerated rights retained by the people, founded equally, it may be, upon natural justice and common reason, as those that are specified within the censorship of courts of justice, when even they shall be assailed. What other tribunal in the government can be invoked to checkmate, such an abuse of unauthorized power? Our bill of rights allows the taking of private property for public use, upon making compensation therefor, but does not prohibit in terms the taking of private property

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for private use. If this should be done by an act of the Legislature against the protestations of the owner, would it not be as flagrant an abuse of legislative authority, as would the taking of private property for public use without compensation?

The latter, it is true, is expressly excepted from the general power of the Legislature, but ought not the former to find equal security and protection, recognized as it is, under the saving clause in the bill of rights referred to? And we ask, who is authorized to say that the judges of some of the States, where this power has been upheld, and especially Judge BLACK, in his very able and learned opinion in the case of *Sharpless v. The Mayor of Philadelphia*, 12 Penn. S. R., 147, would have adopted the line of argument above indicated, if the Constitution of these States, and that of Pennsylvania had contained a similar saving clause in the bill of rights, to that in the Constitution of this State? To say the least of it, we think it questionable.

Second. Besides the doctrine that the Constitution allows the Legislature the use of every power which it does not positively prohibit, a theory which we have attempted to show is inconsistent with the acknowledged rights reserved and secured under our plan of government. The right to tax the property holders of public corporations to aid private joint stock companies in building railways, is referred to considerations like these—that railroads are calculated to develop the resources of the State, and promote the happiness and prosperity, the social and commercial intercourse of her citizens; that, therefore, the State is charged with the duty of encouraging and building, or aiding in building, these great thoroughfares, that in accomplishing this, she may employ means adapted to the end: Do it directly herself, through the power of taxation, and the employment of such extrinsic agencies as may be necessary to

...

carry forward the undertaking; or she may do it indirectly through the instrumentality of counties, cities or even private corporations; that if she adopts this latter course, it involves no other principle than the choice of means, which she has a right to make. Again, that if the State could do the whole work herself, she can do a part; and that this includes the right to select the method of effecting the same. That if she could aid private corporations to build railroads, the use of which is public, by the right of eminent domain, so she could by the power of taxation; and this latter power, she may lawfully transfer to her subdivisions to be used by them for the same end. That the right of eminent domain and taxation attach as an incident to the power of government, that inasmuch as the former may be rightfully exercised in granting the right of way to private corporations in constructing railways; it carries with it the right to employ the latter power in aid of such enterprises, that if the Legislature can create a debt, and lay taxes on the whole people for a work of general interest, it may with equal propriety allow the people of a particular county to tax themselves to promote, in a similar manner, a public work in which they have special interest; that the matter of authorizing counties to take stock in railway companies may be, it is true, an unwise and independent policy, liable to very great abuse, still it does not fall within any of the prohibitory clauses of the Constitution, and therefore, it must like all other improvident legislation, find its corrective in the action of the General Assembly, and not in the doctrine of the courts.

The foregoing really is the substance of the argument as we have been able to collate and condense the same from the different adjudications made use of to sustain the validity of an act of the Legislature, empowering municipal corporations to become stockholders in railway companies.

That the reasons on which the argument is founded are exceedingly plausible none can very well deny; that they are not, however, exhaustive of the argument, as applicable to the laws and Constitution of the State, we must insist. The question is not whether the State may not lawfully construct and maintain by herself, or through her subdivisions, a system of public roads, including railways nor whether she may not, in accomplishing this legitimate object, levy a tax upon her citizens; nor whether she may not even aid private corporations as a choice of means, to an end in effecting the same object. All this may be conceded, nevertheless this obligation of the State, in this aspect of the question, is made the chief predicate of the above argument, as we understand it, whereas, it is only the incident which seems to have been illogically exalted above the principal question in controversy. The complaint is not that the object is unlawful, or unconstitutional, but that the method of obtaining the object is. The rights of a citizen may be as injuriously affected by the unlawful character of the means employed to accomplish a given object, lawful in itself, as by the commission of an unlawful act. To illustrate: the Legislature has the power to alter and change the law of the remedy, but, in exercising this power, it must adopt a constitutional mode, and it cannot do it in a manner (as has frequently been attempted,) to impair the obligation of contracts, otherwise the law, to that extent, would be a nullity. So, to tax a citizen, to keep up a system of highways in his county, of which he has the free use, in common with all the other citizens of the county, the payment of which involves him in no contract obligations, and is followed with no future liabilities, or personal annoyances, is one thing; while the levy of coercive contributions, ostensibly for a similar purpose, but in such manner as not to give him or the public an unrestrained use of the way, in the construction of which

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money was expended, yet which, nevertheless, has the inevitable effect to change his business relations, fix upon him the obligations of contract, as well as the responsibility of a carrier, altogether a different thing. We have already demonstrated the practical effect which a municipal railroad subscription has upon the individual rights of citizens of such municipalities in the State. If we are correct in our statement of this effect, and the conclusions drawn therefrom, we cannot but think they constitute a decisive answer to the argument upon which we are commenting. That argument, in the condensed form in which we present it, seems, it is true, to overlook this aspect of the case, and it is possible that the same consequences do not flow from a county becoming a stockholder in a private railway company, as it respects the rights and liabilities of the citizen taxpayer in those States, as it does in this State. Although some of the courts have intimated the possibility of such being the result, and deprecated the exercise of this power as dangerous and extraordinary.

Believing that we have exhibited a principle underlying this power which practically overturns one of the reserved and fundamental rights of the citizen, that of making his own contracts, choosing his own business pursuits, and managing his property and means in his own way, and which, under the Constitution of this State, however it may be elsewhere, entitles him to the intervention and protection of the courts, we are willing to risk the consequences resulting from the exercise of such a power, as furnishing a sufficient answer in itself to all the reasons which have been, or may be, assigned in favor of its exercise.

If any will take the trouble, especially of those who believe the law possesses the dignity of a science, and holds an exalted rank in the empire of reason, to analyze this question with reference to the principles and the theory of our own political organization, he will discover that it

does implicate a right which, in importance, is above all or any interest connected with the business relation or the physical improvements of the county.

~~There are various other objections to the exercise of this~~ power in this connection and in this particular case, which it might be interesting to discuss, but we forbear except as to one, to which we make very brief allusion. It relates to the necessary inequalities of burdens thrown upon the citizens of Wapello county, in the event they are required to pay the subscription of \$100,000. When paid it is expended in building a railway from the City of Burlington on the Mississippi river to some point on the Missouri river, stretching across the entire State. Neither the work therefore, nor the benefits thereof, are confined to the county of Wapello, but is of general interest as well as special, and therefore comes within the sphere and duty of the State to see (if the work is to be constructed by a tax), that the burden is borne equally by the whole people. For if the county of Wapello is made to pay so large a sum on a work not of local, but confessedly of state importance, whilst an adjoining county, equally interested and benefited, is required to pay nothing, the inequality would be both flagrant and oppressive, and should not be suffered.

The doctrine in consonance with the theory of our political system is, local governments for local objects, and state government for objects of general interest. These principles were very clearly expounded by Mr. Binney, of Philadelphia, in an opinion given by him upon the right of that city to subscribe for stock in the Pennsylvania Railroad Company. Speaking of the city, he says :

“ When we come to the consideration of matters which are not part of her local duties, and are not within her local superintendence, but operate *indirectly* upon her welfare, as everything done by the state, anywhere in the state, does, more or less—roads, bridges, canals, public works of any

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kind — there, as they are a matter of public concern, and *operate upon others, as well as on the city*, are altogether within the duty of other persons, and no power can be implied in the corporation to affect them, or any part of them. The state may tax our property to make such works; the city cannot. The power to carry on such public works by the resources of her inhabitants, or the power to make them because they might afterwards, by a local work, be made available in the city, cannot be maintained, without *throwing the state out of her orbit, and putting the city in her place.*"

Although satisfied to have the questions presented on the law of the case as herein above stated, still we are unwilling to conclude this opinion without a brief allusion to one or two other constitutional objections to the validity of any act which the Legislature might pass, authorizing counties to subscribe stock in railway companies.

Section 2, Article 8, ordains that "The state shall not, directly or indirectly, become a stockholder in any corporation."

Section 1, Article 7, ordains, that "The General Assembly shall not *in any manner* create a debt or debts * * * which shall singly or in the aggregate * * * exceed the sum of one hundred thousand dollars," &c.

The object of the first of the above prohibitory clauses we suppose was to keep the province and functions of the state as a police power separate and distinct from the business operations of the country. It would seem that the same reasons of prudence and policy would apply with equal force to her subdivisions. But we have referred to this clause of the Constitution that we might inquire how it is that counties obtain the power to subscribe stock in railroad companies. They have no inherent power of their own—they have no power derived directly from the Constitution. It was competent, perhaps, for the framers of the Constitution to have given to counties certain powers which they

might have withheld from the state, but this they did not do. It is claimed that this right in a county to take railroad stock is a police power. We do not admit it ourselves, but the whole argument in favor of exercising it is founded upon this idea. Now the county, it is conceded, cannot exercise this power independently of the Legislature, but this power is also reserved by the Constitution from the Legislature. Whence then comes this power? How does it arise? Will it be said that the Legislature can confer a police power which she herself does not possess? We do not believe that such is the theory or nature of the legislative department of our state government. We know that she may confer powers upon the judicial and executive departments, and authorize them to do acts which she herself could not do, for the reason that these are distinct and co-ordinate branches of the government, the functions of which cannot be performed by the General Assembly, but which, nevertheless, are, to a certain extent, under legislative control and regulation. When we say, therefore, the Legislature cannot bestow upon her subdivisions, rights, and powers reserved by the Constitution from her, we mean of course a police power. These subdivisions received their corporate existence and all their corporate duties and powers from the Legislature. They are intended as instruments of government in the hands of the Legislature, to aid it in the administration of its public regulations within certain prescribed localities. This being the case it is competent for the Legislature at any time to suspend these agencies and reclaim the powers which she had thus conferred, and execute them directly herself. If, then, there should be any power which she could not thus reclaim and exercise herself, it follows that it was conferred without authority. Let us put this proposition in the form of a syllogism:

All police powers which the State may legitimately confer upon her subdivisions, may be reclaimed and exercised

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by herself, but she cannot reclaim and exercise the right of a stockholder in a railroad company; therefore she cannot confer the exercise of this right as a police power upon said subdivision.

The absurdity of conferring upon counties the authority to take stock in railway companies is further apparent in this. If such authority is exercised, and the Legislature should afterwards find it expedient to suspend or repeal the corporate existence of such county, as they have already done several times in this State by annexing its territory to adjoining counties, then what becomes of this railroad subscription? and what becomes of the interest which the people of the county have in this stock? and what becomes of the rights of the bondholders, whose claims against the county do not mature for twenty years? Let the advocates of this power answer these questions.

If it should be said that such an act of the Legislature would be invalid because it would impair the obligations of contracts, then it would follow that the Legislature by conferring this authority has lost its control over the boundaries of counties.

Now, as to the other prohibitory clause, in regard to the limitation of legislative authority to create an indebtedness. And upon this subject I speak for myself, and not for my associates. The object of this prohibition was not to secure the people of this State from the evils and burdens of an indebtedness created for the ordinary expenses either of State or county organizations, for such expenses have never been the source of serious complaint or oppression.

It is not, therefore in this sense that the indebtedness referred to in the above clause of the Constitution has any application either to county or State debts. Its real object was to secure the people of this State against a species of vicious and improvident legislation, known to have been indulged in by other States, whereby a large indebtedness

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had been contracted for an extravagant system of internal improvements, and, as a consequence, heavy burdens in the form of taxes imposed upon the people.

But it is said that there is a plain distinction between county and State indebtedness, and that this clause of the Constitution was intended to be only a limitation upon the indebtedness of the latter. It is questionable whether the language of the Constitution will admit of so narrow a construction. It reads as follows: "*The General Assembly shall not IN ANY MANNER create a debt or debts * * * which shall singly or in the aggregate exceed the sum of one hundred thousand dollars.*" It will be observed that the restriction, in terms, is not against the creation of a debt on behalf of the State, any more than on behalf of her subdivisions. We see no reason for confining this inhibition to a State indebtedness by name in contradistinction to that of counties or other municipal organizations. The language is broad enough to cover any manner of indebtedness above \$100,000 the creation of which shall be authorized by the General Assembly, and the burdens of which are to be borne by the people.

Counties have no power of their own to contract large indebtedness for works of internal improvement. If they do so, under the authority of a legislative act, would not this be the creation of a debt in *some manner* that would violate the letter as well as the spirit of this prohibitory clause of the Constitution, and to carry which would result in taxation as burdensome to the people as if the same debt for the same purpose had been contracted in the name of the State?

But suppose this clause of the Constitution could be construed to apply only to such legislative acts as authorize a debt on behalf of the State as a whole, would it not in that event also embrace in principle every legislative act which authorizes a debt to be contracted by any of her

territorial subdivisions of which the State is composed. The object was not to protect the State from the embarrassments of a heavy indebtedness, merely in her abstract meaning as a body politic, entirely disconnected from her people and her soil, but in her concrete sense as composed of her property-holders and citizens, and their local communities of towns, cities and counties. The burden is precisely the same to the people whether imposed by a debt contracted in the name of the State of which they are citizens, or imposed by a debt contracted in the name of counties of which they are members. And it must be confessed that the above provision of the Constitution would wholly fail of its purpose, unless it could be construed to apply to the power of authorizing a debt on behalf of municipal corporations, as well as on behalf of the State. A construction which renders a provision of a statute or of the Constitution void and nugatory, is never admissible if it is susceptible of a different interpretation that will effectuate its real object.

Strong and plausible as are these and other reasons which might be given in favor of construing this clause of the Constitution as denying the Legislature the right to authorize or permit counties to contract large indebtedness for works of internal improvements, still as it is not necessary to do so, I am not just prepared to say that such an act, if passed by the General Assembly, would be in contravention of this prohibitory clause of the Constitution. Doubts are entertained of this fact by very good lawyers, and this reminds me of the well recognized rule that courts should never set aside and annul an act of the Legislature, unless it was clearly and beyond a reasonable doubt in conflict with the Constitution. At the same time I must be allowed to express my want of respect for that subtle and refined argumentation, and far-fetched implication, by which the plain meaning and intention of that sacred in-

strument are attempted, too often, to be defied and superseded.

For the various reasons which we have herein stated, we have to say that we are deliberately of the opinion that the General Assembly of this State cannot pass a valid law authorizing counties in their corporate capacities, to become stockholders in railroad companies—that as a matter of fact no such act has ever yet been passed by the Legislature of this State—that with or without such legislative authority counties have no corporate power to take such subscription—that the election held as aforesaid in Wapello county for the purpose of taking a vote whether the county should not subscribe one hundred thousand dollars as stock in the Burlington and Missouri Railroad Company was nugatory and void—that the Company cannot in law compel the county aforesaid to issue her bonds in pursuance of said vote—and finally that the judgment below dismissing plaintiff's writ of mandamus should be affirmed. .

In enunciating this decision, we desire to say that we have followed our convictions of right, of duty, and of law, which seem to take no denial. We could not bring ourselves to consent to surrender a great fundamental right, which had cost long ages of conflict to extort from the governing classes in favor of the governed, and which not to vindicate, lying, as it did, at the very foundation of this controversy, would have been a step backward towards despotism.

Nevertheless, we are not insensible that in doing so, at this late day, we are liable to expose ourselves and our people to the charge of insincerity and bad faith, and perhaps that which is still worse, inflict a great wrong upon innocent creditors and bondholders—consequences which we would most gladly have avoided, if we could have done so, and been true to the obligations of conscience and principle. Yet it is one of those unfortunate misadventures

Bradford v. Limpus.

which sometimes will happen in the best governed and best intentioned communities.

We know, however, that there is such a thing as a moral sense and a public faith which may be successfully appealed to, when the law is impotent to afford relief. These sentiments, we cannot but believe, still reside in the hearts and consciences of our people, and may be invoked to save themselves and their state from seeming bad faith.

Affirmed.

BRADFORD V. LIMPUS.

1. SALE IN PARCELS. When the sheriff sold a tract of land as one parcel, when it was susceptible of sale in several parcels, it was held that the sale should be set aside.

Appeal from Warren District Court.

TUESDAY, JUNE 16.

THE facts are stated in the opinion of the court.

C. C. Nourse and Lewis Tbdhunter for the appellant.

A mistake in the return of a sheriff cannot affect the rights of a purchaser. *Hopping v. Burnham*, 2 G. Greene, 39; *Doe, ex dem. Wolf et al. v. Heath et al.*, 7 Blackf., 154. It is not irregular to sell lands in a body unless the defendant in execution is prejudiced thereby. *Gwynne on Sheriffs*, 327; *Lessee of Stall v. Macalester*, 9 Ohio, 19; *Woods v. Monell*, 1 John. Ch., 502; *Kiser v. Ruddick et al.*, 8 Blackf., 382.

J. E. Williamson for the appellee.

If the land was divisible, and could be sold in parcels, it was the duty of the officer to sell it in that manner. 1 Binney, 61; 8 Dana, 195; *Boyd v. Ellis*, 11 Iowa, 97.

LOWE, J.—Limpus obtained a judgment against Bradford for \$1,200, and costs; levied upon and sold, according to the sheriff's return upon the execution, the following tracts of land, in a body, to wit: The S. E. $\frac{1}{4}$ Sec. 16, and the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 7, all in Township 75, north of range 25 west, as the property of the defendant in the execution, W. Bradford,— which land was purchased by Limpus as the highest bidder, at \$1,329.18, and to whom a certificate of purchase was delivered by the sheriff. Afterwards, Bradford moved to set aside said levy and sale, because he was not the legal owner, and never had been, of the first named tract of land, yet that the three tracts, susceptible of division, had been sold altogether as one body of land, in such a manner that it was impossible to determine how much each tract sold for, so as to enable him to exercise his right of redemption, which he desired to do, with regard to the two last pieces of land of which he was the owner. The motion was sustained by the court, following, we presume, the ruling in the case of *Boyd v. Ellis*, 11 Iowa, 97, and the authorities there cited. We see no reason to change that ruling, and must affirm the decision below.

Affirmed.

THE STATE OF IOWA v. MCCOMBS.

1. **WAIVER BY APPEAL.** An appeal from the judgment of a Justice of the Peace in a criminal action is a waiver of irregularities in the trial below, the cause standing in the District Court for a trial *de novo* upon its merits.
2. **SAME: PRESUMPTIONS.** When the record discloses that in the trial before the justice, the defendant was present, and asked for a jury, a plea of not guilty is presumed, if the justice failed to enter it upon his docket.
3. **SAME: SUPPLIED IN THE DISTRICT COURT.** In such cases the District Court may, under § 3928 of the Revision of 1860, order a plea of not guilty to be supplied as an apparent omission on the face of the record.
4. **INSTRUCTIONS.** Written instructions read and delivered to the jury as the instructions of the court should be so considered by the jury, though they are not signed by the judge; and the appellant cannot complain of the failure of the judge to sign instructions given when they are made a part of the record by bill of exceptions.
5. **VERDICT.** The words "as charged in the indictment," after the words in a verdict on a trial on information, "We the jury find the defendant guilty," are mere surplusage.

Appeal from Keokuk District Court.

THURSDAY, JUNE 17.

THE material facts are stated in the opinion of the court.

Mackey & Harned for the appellant.

C. C. Nourse, Attorney General, for the State.

BALDWIN, C. J.—The defendant was tried before a justice of the peace, upon an information charged with an assault and battery. Being found guilty and fined, he appealed. Trial was had in the District Court with the same result.

Several errors are assigned, which strike at the irregularity of the proceeding before the justice, such as the failure upon the part of the prosecution to have the information read to defendant, or a plea of not guilty to be entered of record by the justice.

These questions were all waived by the appeal, and the cause stood for a trial *de novo* upon its merits in the District Court. Revision, § 5100. It appears that the defendant was present at the trial, also that he asked for a continuance, and moved for a jury. Under these circumstances, a general denial will be presumed to have been made, and the failure of the justice to enter the plea of not guilty upon his docket could work no prejudice to defendant.

The District Court directed a plea of not guilty to be entered after the cause was appealed, and of this order the defendant complains. We think this objection is met by a reference to § 3928 of the Revision, wherein it is provided that when there are errors or omissions apparent on the face of the record, the court may disregard them, or order the same to be supplied; also, § 5101 provides that no appeal from a judgment of the justice of the peace in a criminal cause shall be dismissed. The court is therefore compelled to direct such plea to be made, and the trial to proceed upon its merits.

It is further objected by the defendant, that the court failed to sign the instructions asked by the defendant, as he is required to do under the provisions of §§ 4813 and 4814 of the Revision. It appears from the record that the instructions given by the court in his charge to the jury, were signed by the judge, but that those asked by the defendant, and modified by the court, were not so signed. They, however, were read to the jury, and were placed in their hands, and directed by the court to be considered as given. The design of these provisions of the Revision is, that when instructions are so signed and filed, they become a part of the record of the case without being embraced in a regular bill of exceptions. The instructions are neither more nor less binding upon the jury, if signed or not signed by the judge. If they are written out in full, and read to the jury, and passed to them as the instructions of the

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court, it is the duty of the jury to consider them. If the defendant had been unable to have the instructions thus modified, made a part of the record of the case, he might have had some cause of complaint; but by his bill of exceptions signed by the court, he has accomplished the same end that could have been attained by having the instructions signed by the judge, and filed with the clerk.

The words as "charged in the indictment" after the words "we the jury find the defendant guilty" are mere surplusage, and do not affect the rights of the defendant.

Affirmed.

LYON v. BARROWS.

1. COMMISSION TO TAKE DEPOSITIONS. Under § 4069, of the Revision of 1860, it is sufficient in a commission to take a deposition in the United States or Canada, to name the county and State in which the Commissioner resides. When the deposition is to be taken in a foreign country, the commission should state the name of the city or town in which the officer resides.
2. DEPOSITION: EXHIBITS. A deposition should not be suppressed on the ground that the witness referred to certain deeds which were not set out as exhibits, when it appears that the deeds and notes were not under the control of the witness, were not the basis of the action, and there was no dispute as to their contents.

Appeal from Scott District Court.

THURSDAY, JUNE 17.

ACTION for moneys received by defendant as plaintiff's agent. The facts necessary to an understanding of the questions raised on the record are stated in the opinion of the court. Judgment for plaintiff, and defendant appeals.

Lyon v. Barrows.

Davison & True for the appellant.

Bennett for the appellee.

BALDWIN, C. J. — The court overruled a motion of defendant to suppress the deposition of the plaintiff, taken in this cause, and also to suppress certain interrogatories and the answers thereto. This ruling is the error assigned.

This deposition was taken in pursuance of a commission directed to Arnon Lemmon, a Notary Public in and for Harrison County, State of Ohio. The officer states, in his return, that it was taken at his office, in the town of Cadiz, in said county and State.

It is claimed by the counsel of appellant that the officer who issued the commission failed to state therein the name of the city or town in which such Notary resided, and for this reason the deposition should have been suppressed.

The question thus made involves a construction of § 4069, of the Revision. Was it intended by the Legislature, that when a deposition was to be taken upon commission within the United States and Canada, that the residence of the Notary or Commissioner should be stated, or does this language apply in cases only where the deposition is to be taken outside of the United States or Canada?

It is matter of doubt, from the peculiar manner in which the sentence in the latter portion of this section is formed, as to what should be the proper construction of this provision of the statute. Judging, however, from the object and design of requiring such residence to be stated, we are inclined to the opinion that the court below did not err in its view of the question. When a deposition is to be taken upon commission and interrogatories, the only object in stating where the Commissioner or Notary resides is, to give the opposing party an opportunity to be present and see that no unfair means are employed to prevent a fair and full statement by the witness. Where a commission

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issues to a Notary Public, if within the United States or Canada, and the county is named where such officer resides, there is certainly sufficient stated to comply with the design of the Legislature. It is not true within our own state, nor do we believe it to be the case in any of the other states, that a Notary can hold his office in any county of the state. His jurisdiction is limited to the county of his residence. Hence if the county and state where the deposition is to be taken, and the officer who is to take the same, are each named, the residence or office of such officer can be readily ascertained.

Where, however, the parties may desire to take a deposition in some foreign country, the Legislature have thought proper to require the city or town in which the officer resides to be stated. We think there is good reason for this requirement. The parties, for instance, may desire to take the deposition before a consul, in some country where there are no such political subdivisions as counties, or where the jurisdiction of such officer is only coextensive with the limits of the city to which he has been commissioned. In such cases the city should be named, in which such consul resides. To compel the party, against whom the deposition is sought, to ascertain where such consul resides, might be attended with costs and trouble that would be unjust.

We think that when the deposition is to be taken in the United States or Canada, that if the commission is directed to a Notary Public in and for a certain county named, it is all that is required, and that such was the intention of the Legislature.

The next objection is, that the deposition shows that a deed and certain notes were referred to by the witness, copies of which were not attached as exhibits, and made part thereof.

In the first place, we say, that the witness shows that the deed is not in his possession or under his control; nor

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does it appear that he had the notes under his control at the time the deposition was taken. Again, neither are these notes or the deed the basis of the plaintiff's action; nor is there any dispute about their contents. They are referred to, incidentally, to show the date of the sale of a certain tract of land, and the consideration received, and are not exhibits within the meaning of the statute.

Affirmed.

CHURCHILL *et al.* v. LYON.

1. **CONFESSION OF JUDGMENT.** When a written confession of judgment is duly sworn to, filed in open court, and judgment thereon rendered in strict accordance with its terms, and when the defendant without attempting to impeach the consideration, or deny the amount due, moves the court to set aside such judgment upon the sole ground that the facts "were not concisely stated," to which the plaintiff responds by showing the good faith of the transaction and the nature of the consideration, the judgment should be upheld and the motion overruled.

Appeal from Polk District Court.

TUESDAY, JUNE 17.

AT the August Term, 1858, of the Polk District Court, in open court, the defendant filed his written confession of judgment in favor of plaintiffs, upon which a judgment was entered up in due form. The confession complies with the law in every respect, except that it fails to state concisely the facts out of which the indebtedness arose, merely reciting that the indebtedness was shown by a promissory note, copied and exhibited therewith.

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In June, 1859, a motion was filed by defendant to set aside and vacate this judgment. Plaintiffs made a showing that the note was given in due course of trade for goods sold; that the confession was drawn in good faith; and that the defect, if any, was one of form, and arose from a misapprehension of the practice and requirements of the statute and from no other cause. To this showing there was no response. Motion sustained, and plaintiffs appeal.

S. V. White for the appellant, contended: 1. That *Edgar v. Greer*, 7 Iowa, 136; *Lawless v. Hackett*, 10 John., 148; *Chappell v. Chappell*, 2 Kern., 217; *Kennedy v. Lowe and Creel*, 9 Iowa, 580; and *Bernard & Co. v. Douglas & Watson*, 10 Iowa, 370; are not applicable to cases in which the judgment was rendered by the court in term time, and not by the clerk in vacation. 2. That the defect in the statement is one of form merely, and not of substance, and it was proper for the court to permit an amendment, thus preserving its lien and priority. *Chappell v. Chappell, supra*. 3. The defendant should be estopped from denying or drawing in question his own sworn statement, *Vanfleet v. Phillips*, 11 Iowa, 558; *Broom's Legal Maxims*, 127, (marg.) 4 Kent, 261; 1 Hill. Torts, chap. 4, p. 132; *Degall v. Odell*, 3 Hill, 216; 17 Conn., 245; 5 Denio, 154; *Allen v. Dewitt*, 3 Conn., 278; 1 Story Eq. Jur., 385; *Welland Canal Company v. Hathaway*, 8 Wend., 483.

Brown & Sibley for the appellee, relied upon *Edgar v. Greer*, 7 Iowa, 139; *Kennedy v. Lowe and Creel*, 9 Id., 580; *Bernard & Co. v. Douglas & Watson*, 10 Id., 370; *Beck v. Sherman*, 13 How. P. R., 472; *Lawless v. Hackett*, 10 John., 149; *Chappell v. Chappell*, 2 Kern., 217; *Dunham v. Waterman*, 17 N. Y. (3 Smith), 9.

WRIGHT, J. — The motion should have been overruled. As suggested in *Van Fleet v. Phillips*, 11 Iowa, 558, the policy

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of the statute, in requiring a concise statement of the facts out of which the indebtedness arose, "was to prevent frauds against creditors, and not so much to give a rule for the government of the parties to the judgment, as between themselves." And where, therefore, the written confession is duly sworn to, filed in open court, and judgment thereon rendered in strict accordance with its terms, and where the defendant, without attempting to impeach the consideration, or deny the amount due, moves the court to set aside such judgment upon the sole ground that the "facts are not concisely stated," to which plaintiff responds by showing, affirmatively, the good faith of the transaction, and the nature of the consideration, the judgment should be upheld, and the motion overruled. This rule accords with the spirit of the statute, and authorities. 11 Iowa, 558; *Chappell v. Chappell*, 2 Kern., 217; *Gilman v. Hovey & Buchanan*, 26 Mo., 280.

Reversed.

THE STATE OF IOWA V. LEYDEN.

1. **APPEAL IN CRIMINAL CAUSES.** The District Court can acquire no appellate jurisdiction of a criminal proceeding by the mere filing of an appeal bond. The appeal can be perfected only by giving the notice required by § 5095 of the Revision of 1860 to the justice who rendered the judgment appealed from.

Appeal from Des Moines District Court.

TUESDAY, JUNE 17.

THE facts are stated in the opinion of the court.

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Chas. Ben Darwin and George Darwin for the appellant.

C. C. Nourse, Attorney General, for the State.

BALDWIN, C. J.—The defendant was tried and convicted before a justice of the peace for an assault and battery, and ordered to stand committed until the fine assessed against him was paid. Upon the same day of the trial, the defendant filed a bond conditioned, that whereas the said defendant was about to sue out a writ of error from the decision of the justice in said cause, &c., &c., that if the said defendant would pay whatever amount was legally adjudged against him, the bond was to be void. This bond was filed and approved by the justice, and the defendant discharged.

A transcript having been filed in the District Court, the district attorney moved to strike the cause from the docket, for the reason that there had been no appeal taken from the judgment of the justice in said cause. This motion was sustained, and defendant appeals.

Under the provisions of § 5095 of the Revision, the defendant, in order to appeal from the decision of a justice of the peace, must give notice to the justice that he appeals, and the justice must make an entry on his docket of the giving such notice. It is upon this notice that the District Court can acquire jurisdiction of the cause, and until such notice is given no appeal is taken.

The mere filing of a bond, even if the bond in this case could be regarded as an appeal bond, is not of itself sufficient to entitle the defendant to an appeal. The record failing to show that the preliminary steps required by law to perfect his appeal had been taken, there was no cause in the District Court for trial, and the court very properly struck it from the docket.

Affirmed.

CHICKASAW COUNTY v. BAILEY.

1. COUNTY JUDGE: ATTORNEY. When the county judge was the general agent of the county, he had the power, and it was his duty, to employ attorneys to represent the interest of the county in actions brought against him as an officer; and to pay a reasonable compensation for their services out of the county treasury.

Appeal from Chickasaw District Court.

WEDNESDAY, JUNE 18.

A statement of facts agreed upon between the parties, is set out in the opinion of the court.

McClintock, McGlathery and Ainsworth for the appellants.

J. O. Crosby for the appellee.

BALDWIN, C. J.—This cause was submitted to the District Court upon an agreed statement of facts, substantially as follows: In the year 1858, the defendant, Lorenzo Bailey, was the acting county judge of said county, and Hiram Bailey was the surety upon his official bond. In that year, an alternative writ of mandamus was sued out against the county canvassers, and Lorenzo Bailey, as the county judge of said county, upon the relation of Samuel Byers *et al.* Said cause was tried at the special term of the District Court of said county, in August following, at which term the writ was made peremptory. The defendants appealed to the Supreme Court, in which the judgment of the District Court was reversed. The said county judge employed counsel to defend the interest of said county in this proceeding, or at least to defend in said cause. For the services of such counsel, the county judge paid the sum of \$500, by a warrant drawn by him as county judge, upon the treasurer, which was duly paid. It is conceded that the amount thus paid was a reasonable compensation for the services

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of the counsel in defending, as they did, the said cause. It is claimed by the plaintiff that, upon this state of facts, the defendants are liable for the amount of money, and interest, thus drawn out of the treasury. The court found for the plaintiff, for the full amount of the claim, and rendered judgment accordingly.

The question for our consideration is, whether, upon this agreed statement of facts, the defendants were liable?

It is conceded that the defendant, as county judge, was a party to the mandamus proceeding, but how far, or in what manner, the rights of the county were involved, is not made to appear. It is also conceded that the counsel employed rendered services, not for Lorenzo Bailey as an individual, but for him as the representative of the interests of the county, and that the compensation paid for such services was a reasonable sum. The county judge had the power, and it was his duty, to employ the services of an attorney whenever he thought the interest of the county were about to be jeopardized, and that such services were needed. Now, the fact that there was a suit pending against the county, that the county judge thought proper to employ and pay counsel for defending such suit, as well as the fact that the amount paid was a reasonable compensation for such services, tends to raise a strong presumption, at least, that, in employing and paying such counsel, the county judge was acting within the limits of his authority. If, on the contrary, the county had not been interested in said proceedings, or the county judge had acted in bad faith in doing what he did, this certainly could have been made to appear.

We must be governed, in our conclusion, by the agreed statement of facts alone, and we readily concur in the conclusion that it is barren of anything that would justify a judgment against the defendants.

Reversed.

The State of Iowa v. Hodnutt.

THE STATE OF IOWA v. HODNUTT.

1. CITY COURT OF DUBUQUE. No appeal lies from a judgment of the City Court of Dubuque to the District Court.
2. SAME: RULES OF PRACTICE. While the criminal jurisdiction of the Dubuque City Court is limited to a class of cases triable before magistrates the mode of exercising this jurisdiction must be according to the rules which govern the District Court.

Appeal from Dubuque City Court.

WEDNESDAY, JUNE 18.

THE facts are stated in the opinion of the court.

H. T. Utley for the appellant.*C. C. Nourse*, Attorney General, for the State.

LOWE, J. — The record in this case exhibits the following facts: That the defendant was arrested and brought before the City Court of Dubuque City, upon a charge of an assault and battery. After his application for a change of venue, on the ground that the judge was prejudiced against him, had been overruled, he plead not guilty, waived a trial by jury, and submitted voluntarily to a trial by the court, was found guilty and duly sentenced, whereupon he appealed to this court, assigning two errors: 1st. That the court erred in refusing to grant a change of venue on the affidavit and application of the defendant. The record shows that the application for this purpose was substantially good in form and matter to authorize a change of venue in proceedings before a magistrate; but quite insufficient in a prosecution before the District Court, in not setting out the nature of the prosecution, or that he could not receive a fair and impartial trial. Whether this application, therefore, was erroneously overruled, depends upon the question whether the rules which the statute prescribes

for the action of the District Court, or of magistrates, must govern and control the Dubuque City Court. The jurisdiction of this court is defined by § 32 of the act for revising and consolidating the laws incorporating the city of Dubuque, and to establish a City Court therein (Session Laws of 1857, page 356), which reads as follows: "Said court shall have jurisdiction of all offences and suits under city ordinances; and shall have general jurisdiction concurrent with the District Court in all civil cases; and shall have concurrent jurisdiction with justices of the peace in all criminal cases." The same section enacts that appeals from the City Court lie directly to the Supreme Court of the State of Iowa. Section 33 of the same act provides that "*the rules and regulations of law which govern the District Court, shall govern the City Court as far as applicable.*"

From these several provisions of the act organizing this court, we conclude no appeal from a decision made therein lies to the District Court; and while its criminal jurisdiction is limited to the class of offenses triable before magistrates, yet the mode of exercising this jurisdiction must be according to the rules which govern the practice in the District Court. That is to say, if the defendant should desire a continuance of the cause, he must bring his application within the rule prescribed in the District Court for that purpose. So in regard to the number of jurors and challenges—all these things he could insist upon in the same manner as if he was being tried in the District Court. But if we adopt the construction that because the jurisdiction of the City Court is concurrent only with that of justices of the peace in criminal procedure, that therefore the law which regulates the practice in Magistrates' Courts must also govern the City Court in its criminal procedure, then the accused could not have the benefit of twelve jurors to try the charge imputed to him; nor could he have, if a change of venue was taken from a city to a Magistrate's

Hamsmith v. Espy.

Court, an appeal directly to the Supreme Court. Of course all this would not be according to the rules and regulations which govern the District Court. Under these rules, we think the application for a change of venue was insufficient, and the court did not abuse its discretion in overruling the same.

What we have already said is an answer also to the appellant's second objection, which he makes, not against any action of the court below, but against himself, namely, that he should not have appealed to this court, but to the District Court. Judgment below

Affirmed.

HAMSMITH V. ESPY *et al.*

1. JUDGMENT AGAINST A FIRM. When a judgment is rendered against a firm in its firm name, the property of the individual members can be rendered liable only by *scire facias*.
2. SAME: MEMBERS OF A FIRM. When a judgment on a copartnership obligation is rendered against the members of a firm, as individuals, the sale of individual property for its satisfaction is not irregular or void. A creditor, in a proper case may in equity compel a resort to copartnership property.

Motion to set aside a Sale.

WEDNESDAY, JUNE 18.

HAMSMITH commenced his action against "Thomas S. Espy, Charles Baker, and John Robinson, doing business as partners, in the name and style of Espy, Barker & Robinson," upon a note made in the copartnership name.

Hamsmith v. Espy.

After judgment against "defendants," the cause was brought into this court, and at the June Term, 1861, a judgment was rendered against them in their individual names, as well their sureties on the appeal bond. An execution was issued, and levied upon two lots in Fort Madison, one of them belonging to the firm, and the other the individual property of Espy, who now moves to set aside this sale of his lot, by showing that there was other firm property, of which the sheriff, and all persons at the sale, had notice, amply sufficient to satisfy the writ, and which was pointed out to him before the levy.

Thos. S. Espy for the motion.

J. M. Beck, contra.

WRIGHT, J. — We are aware of the rule in equity, that partnership property should pay firm debts, and individual property individual debts. But suppose a judgment is rendered against persons composing a firm, in their individual names, if individual property is sold under an execution issued thereon, is the sale invalid, though there may be partnership means? We think not. The judgment is several, the writ runs against defendants, as individuals. No step further is necessary in the first instance, (as by *scire facias*, or the like,) to make individual property liable, and it is not irregular to levy and sell that which the writ commands the officer to seize. By his writ, he does not know of a joint liability, and his simple duty, primarily, is, to make the money from property belonging to either of the defendants named. A creditor of either might, in a proper case, in equity, by a showing of all the facts, compel a resort to the partnership assets. But if this is not done, the individual debtor cannot complain of the illegality of the sale.

Lewis v. Denton.

Our Code changes the common law, in providing that a partnership may be sued in its firm name. If thus sued, a *scire facias* is necessary, in order to reach individual property. If, however, a plaintiff follows, as he may, the common law requirement, of giving the individual names, and thus serving and suing all, he may take the property of either partner in satisfaction of his writ. In such a case a *scire facias* is not necessary.

Motion refused.

LOWE, J., dissenting.

LEWIS V. DENTON.

1. SET-OFF: ASSIGNED NOTE. In an action by the assignee of a note duly assigned, the defendant cannot, while the action thus stands, litigate a set-off against the assignor by simply averring that he is the real party in interest.
2. SAME: NO DEFENSE. A set-off is not a defense—it is the defendant's cause of action against the plaintiff.

Appeal from Johnson District Court.

WEDNESDAY, JUNE 18.

BILL to foreclose a mortgage executed by Robert Denton to secure the payment of a certain promissory note payable to Miles K. Lewis, by whom it was assigned to plaintiff. The mortgaged premises, having been, subsequently to the execution of the mortgage, sold to Abby Denton, she was made a party defendant. The defendant, Robert Denton, answered, alleging that the assignment to plaintiff was

Lewis v. Denton.

without consideration, and for the purpose of avoiding a set-off against the note, if it remained in the hands of the original payee; and claimed of Miles Lewis as "the real party in interest in the said promissory note, the sum of three hundred dollars," damages, for waste committed on the premises described in the mortgage. To this answer the defendant demurred on the ground that it set up a cause of action against a person not a party to this suit; and that the claim set out did not constitute a defense to this action. This demurrer was sustained, and defendant appeals.

Clark & Bro. for the appellant.

Mackey & Bradley for the appellee.

WRIGHT, J.—A set-off is not a *defense* to an action. It is the defendant's action against plaintiff, and plaintiff's right to recover upon his cause of action is in no manner affected by such set-off.

If, therefore, an action is brought upon a note, duly assigned, in the name of the assignee, the defendant cannot, while the action thus stands, ask to litigate a set-off against the assignor, by simply averring in his pleadings that such assignor is *the real party in interest*. He is not a party to the record, and no judgment could be taken against him on such set-off, and substantially defendant asks such judgment when he pleads his set-off.

The demurrer was properly sustained.

The State of Iowa v. Fleming.

THE STATE OF IOWA V. FLEMING.

1. ATTORNEY GENERAL AND DISTRICT ATTORNEY. A criminal cause is under the control of the District Attorney until the Supreme Court acquires jurisdiction, after which it is under the sole control of the Attorney General.
2. APPEAL. A criminal cause cannot be appealed to the Supreme Court after the expiration of one year from the rendering of the judgment complained of.

18	443
116	586

Appeal from Louisa District Court.

WEDNESDAY, JUNE 18.

THE defendant was accused of intoxication, was found guilty, and sentenced to pay a fine of ten dollars and be imprisoned for thirty days. The cause was appealed to the District Court, and the trial was attended with the same result. The further facts necessary to an understanding of the question raised are presented in the opinion of the court.

J. H. Hurley for the appellant.

C. C. Nourse, Attorney General, for the State.

BALDWIN, C. J. — In this cause, an agreement was made between the District Attorney and the attorney for the defendant, that an appeal might be taken by the defendant to the Supreme Court, notwithstanding the fact that more than one year had expired after the judgment of the District Court had been rendered.

The Attorney General now asks that the cause be stricken from the docket, denying the power of the District Attorney to make any agreement which would either waive or prejudice the rights of the State in this court.

It is made the duty of the Attorney General to defend for the State all causes in the Supreme Court in which the

State may be a party, or interested. Revision, § 124. It is made the duty of the District Attorney to appear for the State in the several counties of his district in which the State or any such county may be a party. He is also required, in any cases taken from his district to the Supreme Court, to furnish the Attorney General a brief, containing the substance of such proceeding, and the questions therein involved, &c. See Rev., § 374. These provisions of the statute plainly define the duties of each of said officers, and there is no room for a controversy as to the powers that each possess.

While the case is in the District Court, it is without doubt, under the control of the District Attorney. Any agreement he may make with reference to the disposition of the cause, so far as it is proper, or within the limits of the law, should be regarded as binding. When the case is in the Supreme Court, it is then under the control of the Attorney General. Section 4906 provides that no appeal can be taken until after judgment, and then only within one year thereafter.

This court cannot, under this provision, acquire jurisdiction of a cause until there has been judgment rendered. The parties cannot, even by agreement, appeal from the ruling of the District Court upon a motion to quash or a demurrer to an indictment. There must be a judgment rendered before either party can appeal. The same may be said with reference to the latter clause of this section. It is equally, if not more, imperative. It is the policy of the law that all criminal litigation should be as early terminated as possible. In view of this policy, this provision was enacted. If a party fails to prosecute his remedy by appeal for one year after judgment, such right is forever at an end, and this court has no power to entertain jurisdiction of a cause after this time has elapsed. Nor do we think that the consent of the attorney for the State can confer such jurisdiction.

Dismissed.

McHENRY v. DAY *et ux.*

1. **DEED BY A WIFE.** Where a trust deed was executed by a husband and wife conveying several town lots, including the homestead, and it was shown by the evidence that the wife executed it without reading, upon the statement of her husband, that it conveyed certain property mentioned, which did not include the homestead, and the trustee and beneficiary had no knowledge of, and was in no wise a party to, this false representation; it was held, that as between the wife and innocent parties, who acted in good faith in the transaction, she could not take advantage of such negligence, and make it the ground of relief against the consequences of her own signature.
2. **SAME: ACKNOWLEDGMENT.** A wife will not be permitted to take advantage of her own irregular and wrongful acts in the acknowledgment of a deed, against parties who, ignorant of such acts, have loaned money upon the security thus acknowledged, but regular and fair upon its face.

Appeal from Polk District Court.

FRIDAY, JUNE 20.

THE facts are stated in the opinion of the court.

Curtis Bates for the appellant, as to the deception practiced by D. P. W. Day, upon his wife, in procuring the execution of the deed of trust, 2 Phil. Ev., 272 (Cow. & Hill's notes); 1 Story Eq. Jur., 224; 2 Kent's Com., 482; notes *a* and *b*; *Westfall et ux. v. Lee et al.*, 7 Iowa, 12; *Coriell v. Hand*, 2 Id., 552. As to defects in the execution of the deed, and the jealousy with which courts guard the rights of married women, *Carr v. Williams et al.*, 10 Ohio, 305, and the authorities cited in the argument for defendants; *McFarland v. Febejer's Heirs et al.*, 7 Id., 194; *Catlin v. Ware*, 9 Mass., 218 (Marg.); *Luskin v. Clutes*, 13 Id., 222; *Westfall et ux. v. Lee et al.*, *supra*; *Schaffner et al. v. Grutzmacher et al.*, 6 Iowa, 137. As to the contradiction of an acknowledgment, *Tatum v. Goforth*, 9 Iowa, 248; *Grapengether v. Fejervary*, Id., 163; *Blain v. Stewart*, 2 Id., 282; Revision of 1860, § 2238.

McHenry v. Day.

M. D. McHenry, pro se, contended that the defendants should not be permitted to take any advantage of their own negligence or wrong. 2 Para. Cont., 270; 1 Story Eq. Jur., § 385; *Babcock v. Hoey*, 11 Iowa, 375.

LOWE, J. — The facts out of which this controversy arises are these: The defendant, Day, about the 27th day January, 1857, borrowed the sum of \$2,500, from Messick & Robertson, of Kentucky, through their agent, Wm. H. McHenry, of Des Moines, Iowa, to secure which the said Day and wife executed and delivered a deed of trust, (naming Wm. H. McHenry, the trustee therein,) upon the following described property: The south half of lots 1 and 2, in block C., in the Commissioners' Addition to Fort Des Moines, Polk county, Iowa. Also, lots No. 1, 2, 3 and 4, in block B., lots No. 1 and 2, in block C., lots No. 1, 2, 3, 4, 5, 6, 7, 9 and 10, in block D., and lots No. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 in block A., situated in D. P. W. Day's Addition to Fort Des Moines.

Default being made in the payment of the money, the property conveyed in the deed of trust, was sold by the trustee to the plaintiff, as the highest bidder for the sum of \$601; who brings his action of right to recover possession of the two lots first above described. The defense set up may be stated in substance, as follows: that at the time of the execution of said deed of trust, the defendants were occupying said lots as their homestead, and continued to do so, up to the sale of the same by the trustee, and the institution of this suit; that Alice E. Day, the wife of D. P. W. Day, had not acknowledged said deed of trust before any officer authorized to take the acknowledgment of deeds, that the notary public, before whom said acknowledgment purports to have been taken, never presented said deed of trust to her for that purpose; that when, as a matter of fact, she did sign the same, the notary was not

McHenry v. Day.

present; that her husband presented the deed to her for her signature, representing at the time, that it was for the lots on the hill in his own addition to the city of Fort Des Moines; that, relying upon this statement, she signed the deed without reading it; that she would not have signed the deed, had she been advised that her homestead was included in the same.

A demurrer was filed by plaintiff to the sufficiency of the matters, set forth in this defense, and before a hearing was had upon the same, the whole cause was, by order of the court, referred to JAMES M. ELWOOD, Esq. On the hearing before the referee, it was agreed that the whole case, without deciding the demurrer, should be heard upon the merits, and that either party should give in evidence, under the pleadings, proofs to establish his or their case to the same extent, and with the same effect, as though specially pleaded.

In the award of the referee is reported all the evidence taken before him, together with the facts which, in his judgment, the proofs establish, and his conclusion of law thereon. After finding that the legal title of the premises in controversy was in the plaintiff, in virtue of the deed obtained under the trustee's sale, he finds, also, that the evidence in the main, sustains the new or special matters of defense set up in the answer, but nevertheless, the referee held that these facts, if true, did not constitute a legal defense in this action; that the said Alice E. Day, in executing said deed of trust with her husband, is presumed to have been cognizant of the property which the same conveyed, but if, through her own mistake or negligence, she did not ascertain what property the deed in fact embraced, still, as between herself and the innocent parties who acted in good faith in the transaction, she cannot take advantage of such negligence, and make it the ground of relief against the consequences of her own signature; that,

as between herself and innocent parties, where no fraud is alleged, the said Alice stands in no better position than if she had executed said deed of trust voluntarily, and with a full knowledge of all the facts in the transaction, *Babcock v. Hoey*, 11 Iowa, 375; that, between the trustee, beneficiaries, and their immediate grantees, on the one hand, and the grantors on the other, it was not necessary that the deed of trust should have been acknowledged, in order to make it a binding or valid conveyance.

This last proposition, perhaps, is stated rather broadly by the referee, so far as Alice E. Day is concerned. It is not necessary, in the determination of this cause, or in affirming the general conclusion to which the referee and the court below came, to hold that a deed, unacknowledged by the wife, executed in conjunction with her husband, is valid against her, even in a direct proceeding between the parties to the same. It has been the policy of the law, as well as of the courts, to hold a strict compliance with the solemnities of the law, in divesting a married woman of her interest in real estate. The certificate of acknowledgment to the deed of trust in this, is regular and in due form, and purports to have been made in good faith. It is true the evidence shows the following irregularity in the acknowledgment of the deed: That the notary had certified to the acknowledgment of the same, without requiring the personal presence of the party, but upon a previous verbal authority given by her, accompanied, at the time, with her written signature, to the effect that the notary should do so when a deed was presented by her husband, with her signature affixed. This informality in the mode of taking the acknowledgment would be fatal, it may be, to the validity of the deed, under some circumstances, but certainly she cannot be permitted to take advantage of her own irregular and wrongful acts, against parties, who, ignorant of all this, had loaned a large sum of money to

In the Matter of Pierson's Executors.

her husband, upon the strength of a security perfectly regular and fair upon its face, both in form and substance. *Baldwin v. Snowden et al.*, 11 Ohio State R., 208.

Believing that the decision below was founded upon the law applicable to the facts in this case, and upon which further elaboration does not seem to be required at our hands, we accordingly affirm the same.

Affirmed.

13	449
133	424

IN THE MATTER OF PIERSON'S EXECUTORS.

1. **APPEAL BOND: ADMINISTRATORS.** When an appeal is taken by executors from an order of the County Court removing them from office, and appointing their successors, and the bonds of such executors on file are sufficient to cover all the assets coming into their hands, the appeal bond should be in a sum sufficient to cover the costs of the proceeding.
2. **APPEAL FROM ORDER.** An order discharging a rule requiring a county judge to show cause why an appeal was not allowed from his order removing executors, affects substantial rights, and may be reviewed by the Supreme Court on appeal.

Appeal from Des Moines District Court.

FRIDAY, JUNE 20.

THE executors of the estate of John Pierson, deceased, were required by the County Court of Des Moines county, to make a report and showing of the condition of the estate, and of the demands and assets in their hands. On the coming in of this report, exceptions were filed by certain of the heirs, and such proceedings were had that an order was made for their removal, and the appointment of an administrator, with the will annexed. This was on the 4th of January, A. D., 1862. The executors prayed an appeal on the 10th of the same month, and thereupon the

appeal bond was fixed at \$45,000. On the 20th of the same month they applied to the District Court for the allowance of an appeal, upon the ground that injustice had been done, that they could not give the bail fixed, and that the same was grossly excessive. A citation issued to the County Court to show cause why the appeal was not allowed. To this there was a return, after examining which and all the premises, the rule was discharged, and the executors now appeal to this court.

Charles Ben Darwin for the appellants.

1. When executors have already given bonds for the assets in their hands, in any proceeding concerning them, they are allowed appeals without further bond, or with bond sufficient to indemnify against costs which may be imposed upon them as persons for wrongfully invoking such appeal: 4 Bac. Abr., 14 (Bouv. Ed.), 1 Salk., 98; 1 Selw. Pr., 45; 2 Tidd's Pr., 1152; Pet. on Bail, 249-256. See, also, the general statutory provision regarding it, in New York, in Dayton's Surrogate, 349, 738, 744, 752, *et seq.*; and 1 U. S. Eq. Dig., 523, 568; 1 H. & Mumf., 15, 26.

Hall, Harrington & Hall for the appellee.

1. The appeal should be dismissed. The fixing of the amount of a bond is a mere exercise of discretion from which no appeal lies. *Trustees of Iowa College v. The City of Davenport*, 7 Iowa, 214, and the authorities there cited; *Dyer v. Ludlam*, 1 Harr. (N. J.), 531.

2. The action of the County Court and District Court in requiring an appeal bond in the sum of \$4,500, was legal and just. Bac. Abr., "Bail;" Toller's Ex., 467; 1 Salk., 98; 8 Id., 57; *McKay v. Devers*, 9 Geo., 184; 6 Leigh, 299; 4 Gratt., 9; *Commonwealth v. The Judges of the Orphans' Court*, 10 Barr (Penn.), 37.

WRIGHT, J.—The law provides that an appeal from a decision of the County Court shall be taken within thirty days from the day in which the decision was made, "by claiming an appeal, and filing in the county office a bond with one or more sureties, and a penal sum to be approved by the county judge or clerk," &c. (§ 267.) "If the party entitled to an appeal fails, without fault on his part, to claim, or perfect, or prosecute his appeal, he may apply to the District Court, which, upon being satisfied of the matter, and that the case requires revision, may authorize an appeal to be taken upon such terms as it deems reasonable, and may take such order as may be requisite to give it effect." (§ 270.) The District Court, also, has a general supervision over all inferior courts, to prevent and correct abuses, where no other remedy is provided. (§ 2663.)

By the statutes of some of the states, it is provided that an administrator may take an appeal without giving security. Such statutes, however, apply to cases where the judgment or order affects him in his representative capacity. If the judgment be personal, to be paid out of his own means, he must give bonds as any other person. Our statute does not exempt an administrator from this duty. When the judgment is against him in his representative capacity, however, then, as it is to be paid finally from the assets of the estate, for the faithful application of which he has already given the required security, the penalty would properly and reasonably be but light.

In this case it seems that the executors had given bond in the sum of eighty thousand dollars. There is no suggestion that this is not amply sufficient to cover all assets coming into their hands. Nor was any step taken to increase the amount of this bond, nor any attempt to show that the sureties were not fully solvent. There was no order against them to pay money, nor to do any act, as individuals. Every act of mal-administration charged or

In the Matter of Pierson's Executors.

found by the court, was covered by their bond as executors. If the finding of the county court should be sustained, there could be no judgment for money, and none against the sureties on the appeal bond, beyond the costs of the proceeding. Under such circumstances, it seems to us that the bail demanded was excessive, that to require it operated as a virtual denial of justice, and that the district court erred in discharging the rule.

Reversed.

On the 12th day of January, 1863, the following additional opinion was delivered by —

WRIGHT, J.—In a petition for re-hearing, appellee's counsel urge that this court could not take jurisdiction of the case, as the matter appealed from does not fall under or within any of the provisions of the Revision giving the right to an appeal. We are of the opinion, however, that the order discharging the rule affected a substantial right, and in effect determined the action. As such it is reviewable in this court under clause 1, § 2631, of the Revision.

If the District Court errs in matter of law, in determining that the case presented does or does not require revision under § 267 of the Revision, such ruling may be re-examined in this court. And if in a matter of fact, the discretion has already been abused, this court will review and reverse.

Re-hearing refused.

ABBOTT V. CHASE.

1. **EQUITABLE DEFENSE AT LAW.** An equitable defense cannot be made available against the legal title to real estate in an action at law.
2. **MOTION TO TRANSFER.** The Supreme Court will not interfere with the ruling of the court below, in refusing to transfer a cause to the chancery docket, upon the suggestion of an equitable defense, when it does not appear that the character and nature of that defense was fully stated; or when such defense is based upon a title bond, and there is no suggestion that it has not been forfeited.

Appeal from Blackhawk District Court.

FRIDAY, JUNE 20.

ACTION to recover the possession of real estate. The plaintiff alleged in his petition, that he was the owner in fee of the premises in controversy, upon which allegation issue was joined, and on the trial defendant offered to prove that a certain deed executed by him conveying the premises to plaintiff, and under which plaintiff claimed, was executed to secure the payment of money loaned, and was intended by the parties to be a mortgage; that a bond for the reconveyance of the premises upon the payment of the money so loaned, was executed by plaintiff to defendant contemporaneously with the execution of the deed. This evidence the court refused to receive, whereupon the defendant offered to amend his answer, but leave to so amend was refused by the court. Verdict and judgment for the plaintiff, and the defendant appeals

L. Chapman for the appellant, contended: 1. That the court erred in excluding the evidence offered; *Gillis v. Black*, 6 Iowa, 439; *Kilbourne v. Lockman*, 8 Id., 380: 2. That the bond and deed, being executed at the same time, constituted a mortgage; *Hall & Cochrane v. Savill*, 3 G. Greene, 37; 1 Wend., 113; *Jacobs v. Finkle*, 7 Ind., 434; *Kelley & Wife v. Beers*, 12 Mass., 389; *Bodwell v. Webster*,

Abbott v. Chase.

13 Pick., 411: 8. The court should have allowed the amendment. Code, § 2977; 8 How., 451; Barb., 164; 6 How., 270.

Bagg & Allen for the appellee, argued: 1. That the equitable defense set out by the proposed evidence was inadmissible in an action at law, and could be made available only by motion to transfer to the chancery docket, as contemplated by §§ 2880 and 2816 of the Revision.

WRIGHT, J. — The case of *Page v. Cole*, 6 Iowa, 158, clearly sustains the ruling of the court below, that defendant's assumed equitable title was no defense to the legal title of plaintiff to the property in controversy.

If it be admitted that defendant's claim to have the cause transferred to the chancery docket was in time, two considerations forbid a reversal of the cause on that ground. The one is, that while it is said that defendant asked leave to plead and set up his equity, the character and nature of this plea is not stated. It may have been that the defense presented satisfied the court below that it could not avail. The other is, that while, from some affidavits and other parts of the record, it is inferred that defendant held a title bond for the conveyance of the real estate in controversy, upon the payment of a certain amount, it is no where suggested that the bond was not forfeited, nor that defendant had paid or offered to fulfill the contract on his part.

Affirmed.

Haynes, Hutt & Co. v. Seachrest.

HAYNES, HUTT & CO. v. SEACHREST *et al.*

1. **UNACKNOWLEDGED DEED.** A deed defectively acknowledged is valid as between the parties and all persons having knowledge of its existence.
2. **MISTAKE.** A court of equity will correct a mistake in a deed as against a subsequent purchaser who acquires his interest with knowledge of the existence of the deed and of the mistake therein.
3. **RATIFICATION: VERBAL AND IN WRITING.** A deed conveying the property of a firm, executed by one member for himself and for his co-partner, is sufficient and valid as a deed of the firm, if ratified either expressly or by implication, verbally or in writing; but such ratification will not affect the rights of subsequent purchasers or incumbrances which have already accrued.
4. **SAME.** A recognition which will have the effect to make a deed valid, which but for such ratification would be ineffectual to pass the title, as against the party or subsequent incumbrances, should be clear and express, or be implied from circumstances equally clear and undisputed.
5. **MORTGAGE: PRIORITY.** A deed of trust conveying certain real estate belonging to S. & M., was executed by M. for both himself and S. without any authority to make such a conveyance for S. Afterwards S. & M., with their wives, united in the execution of a mortgage to another party to secure the payment of two notes. On one of these, which had been assigned by the mortgagee, an action was commenced by the assignee, in which sufficient personal property to satisfy the same was attached, but was discharged upon the execution of a delivery bond. In a proceeding to foreclose the last named mortgage, to which the assignee was not a party, it was held:
 1. That it was error to decree a sale of the mortgaged premises for the satisfaction of the note which had been assigned.
 2. That the deed of trust executed by M. was entitled to priority upon his interest in the property therein described.
 3. That the lien of the mortgage was entitled to priority as to the interest of the other mortgagors, and that the mortgagees were entitled to a foreclosure for the amount which remained due them.

Appeal from Warren District Court.

MONDAY, JUNE 23.

ON the 11th day of November, 1857, a deed of trust, purporting to be signed by E. G. Seachrest and C. M. Meek,

13	455
94	511
94	538
13	455
108	271
13	455
132	435

was made to Lewis Todhunter, to secure certain debts owing to Stadler Bro. & Co. and Laner Bro's. This deed was upon the following described lands: "The undivided two-thirds of the East half of the N. E. $\frac{1}{4}$ of section 31, and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 30, except the plat of East Palmyra, and twelve rods off the West side of said quarter, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sect. 25, and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and South half of N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sect. 25, all in Township No. 77, Range 22."

This deed was signed by Meek, as is claimed, for himself and Seachrest, the said Seachrest being at the time absent from home, was acknowledged in the same manner before the trustee therein named, and filed for record on the next day.

On the 20th April, 1859, the said Seachrest and Meek, with their wives, in conjunction with Davis Meek and wife, (who owned the other undivided third,) made a mortgage to the complainants, upon lands similar in description, except that the parcels in sect. 25 were located in Town. 77, R. 23.

Complainants brought this action to foreclose their mortgage, making the mortgagors, the beneficiaries and trustee named in the prior deed parties, and asking that their mortgage shall have priority. The cause was heard upon the pleadings and testimony, and a decree entered in accordance with the prayer of complainants' bill, and respondents appeal.

C. C. Cole and Lewis Todhunter for the appellant.

I. The deed on its face being properly signed and acknowledged and recorded, was notice to subsequent incumbrancers, although it would afterwards be made to appear that it was defectively signed and acknowledged. *Hopping v. Burnam*, 2 G. Greene, 39; *Miller v. Chitten-*

Haynes, Hutt & Co. v. Seachrest.

den et al., 2 Iowa, 815; *Blain v. Stewart*, Id., 378; *Bell & Co. v. Thomas*, Id., 384; *Calvin v. Bowman and Neal*, 10 Id., 529.

II. Brown & Co. were necessary parties to this suit, and when there is a defect of parties, objections may be taken thereto at the hearing, and even on appeal. *Johnson v. Rankin*, 2 Bibb, 184; *Cox's Heirs v. Strode*, Id., 275; *Barry et al. v. Rogers et al.*, Id., 314; *Orittenden's Administrator v. Craig*, Id., 474; *Parberry's Heirs v. Goram*, 3 Id., 107; *Bainbridge v. Owen*, 2 J. J. Marsh, 484; *Roberts' Heirs v. Elliott's Heirs*, 3 Monr., 395; *Dougherty and Wife v. Morgan's Executors*, 6 Id., 152; *Cooper v. Gunn*, 4 B. Monr., 594; *Graham & Butler v. Chatoque Bank*, 5 B. Monr., 49.

S. V. White, for the appellee, submitted an elaborate argument upon the evidence, in which he cited the following authorities: Code of 1851, §§ 2410, 1227; Story on Partnership, § 121-2; *Price & Co. v. Alexander & Co.*, 4 G. Greene, 427; *Lyon v. Bunn*, 6 Iowa, 48; *Crawford v. Burton*, 6 Iowa, 476.

WRIGHT, J. — Whether the deed of trust was so defectively acknowledged as that the recording of the same would not impart constructive notice of its contents to the subsequent mortgagees, we need not determine, as an examination of the testimony satisfies us that complainants had actual notice of said trust deed. And in arriving at this conclusion, we have not considered the testimony of Todhunter, who took the acknowledgment. He is a party to the record, and his testimony was properly excluded by the court below. Aside from this testimony, however, we are satisfied that complainants knew, at the time they took their mortgage, of the existence of the prior deed, and that their lien was subject to that of respondents. And this knowledge carried with it the further fact that there was a mistake in the first conveyance. That there was a mistake, is indis-

putable. And that complainants believed and understood that the land described in the deed was the same as that covered by their mortgage, is very clearly shown. The mistake evidently occurred without any fault of any person, the scrivener inadvertently writing the figures 22 instead of 23, as applied to the land in section 25. It was not until long after both instruments were made that the mistake was discovered. Indeed, it is questionable from the pleadings, whether it was fully known to complainants at the time of the institution of this suit.

The mortgagees having actual notice, therefore, of the deed and of the mistake, the sufficiency of the acknowledgment is not material. The deed was good as between the parties, and all persons having actual knowledge of its existence, without any acknowledgment. *Miller v. Chittenden et al.*, 2 Iowa, 315; *Blain v. Stewart*, Id., 378; *Bell & Co. v. Thomas*, Id., 384; *Dussaume v. Barnett*, 5 Id., 95.

We are then next to inquire as to the amount of interest acquired by respondents by the trust deed. It will be remembered that Seachrest did not sign, nor acknowledge the deed. He was absent at the time, and there is no testimony whatever that he gave authority in writing or otherwise to his co-partner to make the conveyance. It is claimed, however, that upon his return he ratified the act, and that this was effectual to pass his title. The ratification, if any, was verbal, and not in writing.

The doctrine of the English courts is, that a sealed instrument, when made by one partner for the others, can only be made valid by a prior authority or subsequent ratification, evidenced by writing, under seal. This rule, however, is not followed in this country, it being well settled by the current of decisions, that a prior authority or subsequent ratification, express or implied, verbal or written, is sufficient to make the deed binding upon the firm. (Story on Part., § 122, and note 2.)

Was there a ratification, then, of this act of Meek, in signing the name of Seachrest to the deed? The want of original authority, is clear. The interest of Seachrest did not pass, therefore, by the deed, unless there was a ratification. Upon this point the burden of proof is upon respondents. Not only so, but the ratification should have taken place before the making of the mortgage. Does the proof establish this fact? We are constrained to hold that it does not. Two witnesses speak of conversations had with Seachrest on the subject. But the time of these conversations is left entirely indefinite. Not only so, but his admissions, that he recognized the act, are stated in a loose manner, nor is there any proof as to when he first knew, and attempted to ratify, the deed. A recognition which shall have the effect of making valid a deed, which, but for such ratification would be ineffectual to pass the title, as against the party or subsequent incumbrancers, should be clear and express, or be implied from circumstances equally clear and undisputed. The party having the affirmative must fail, unless he brings his proof up to this standard.

Another point in this case is made upon the following facts: The mortgage to complainants was to secure two notes. One of these was assigned to Brown & Co. They commenced an action at law on this note, and attached personal property sufficient to satisfy the same. The property was released by giving a delivery bond, and a judgment was recovered on the note. Brown & Co. were not made parties to this proceeding. The decree in this case finds in favor of complainants for the whole amount of both notes, and directs the mortgaged premises to be sold to satisfy the same. The mortgagees insist that this was error, and that there should have been no recovery beyond the amount due on the note still held by complainants. And this position we think is correct.

Complainants were not the owners of this note. Brown & Co. were not parties, nor did they ask a foreclosure. The liability of complainants as indorsers, would not give them the right to foreclose the mortgage for that amount. They were not in a position that they could elect which to prosecute, the action at law on the note, or the foreclosure proceedings, for the suit on the note was not under their control. Not only so, but until the property attached was exhausted, Brown & Co. even could not, as against another incumbrancer, resort to the mortgage. If they could not, then it is very manifest that the indorsers, who were only contingently liable, would have no greater right.

Our conclusion, then, is, that complainants were entitled to a foreclosure for the note still held by them. That the deed of trust held by the creditors, Stadler, Bros. & Co. and Lauer Bros., is entitled to priority of lien upon the interest of C. M. Meek in all the lands, and that the prayer of the cross-bill, (or the answer which is made such,) to correct the mistake to this extent, should be granted, and that the mortgage of complainants, to the amount of the debt still due them, should have priority, as to the interest of all the other mortgagors beside the said C. M. Meek.

The decree will be thus modified, in this court, or remanded for that purpose, as complainants may prefer, at their costs.

Lyster v. Brewer.

LYSTER V. BREWER.

1. MOTION TO SET ASIDE A SALE. The court should not pass upon a motion to set aside a sheriff's sale without notice to the adverse party.

Appeal from Marion District Court.

MONDAY, JUNE 23.

PLAINTIFF obtained a judgment against defendant before a justice, and filed a transcript thereof in the office of the Clerk of the District Court. Execution issued thereon, which was levied upon certain real estate. This was sold, purchased by plaintiff, and a deed made by the sheriff. Some twenty months after the execution of the deed, Titus Neal, claiming to hold under the defendant in the execution, moved to set aside this sale. Motion sustained, and plaintiff appeals.

SeEVERS, Williams & SeEVERS for the appellant.

J. E. Neal for the appellee.

WRIGHT, J. — The order setting aside the sale, and all proceedings thereunder, must be reversed. The plaintiff had no notice that such motion would be made, nor did he make a voluntary appearance thereto. "To set aside a sale on motion, without notice, or showing that the opposite party voluntarily appeared, in no manner binds him, and the party making the same can derive no advantage therefrom."

Wright v. Leclair, 3 Iowa, 241, and the authorities there cited.

As the record does not purport to contain all the evidence upon which the court below acted in deciding this motion, we shall not pass upon the correctness of the ruling. And this course we feel the more compelled to take, for the reason, that when the parties are all before the court the testimony and showing may be materially changed.

Reversed.

The State of Iowa v. Kreig.

THE STATE OF IOWA V. KREIG.

1 INDICTMENT: NUISANCE. An indictment for causing and continuing a public nuisance by establishing, keeping and using "a certain building or place" for the sale of intoxicating liquors is sufficiently definite in its description of the place.

Appeal from Des Moines District Court.

MONDAY, JUNE 23.

DEFENDANT was indicted for causing and continuing a public nuisance; for that he did, on the 1st of January, A. D. 1860, and afterwards, in the County of Des Moines, establish, continue and use "a certain building and place," in which he kept and sold intoxicating liquors, to wit: whiskey, &c., to the common nuisance, &c. A demurrer was interposed, upon the ground (as far as now insisted upon), that the indictment did not sufficiently describe or designate the place or building in or by which the crime was committed. Demurrer overruled, defendant was convicted, fined twenty dollars, and appeals.

Hall, Harrington & Hall for the appellant.

The description in the indictment is not sufficient. Rev. of 1860, §§ 4060, 1564; 1 Chit. Cr. L., 196 (marg.); 30 Eng. C. L. R., 238; 3 Ad. & El., 815; *The State of Iowa v. Crogan*, 8 Iowa, 523; *The State of Iowa v. Maurer*, 7 Id., 406; *Capps v. The State of Iowa*, 4 Id., 502; *Norris House v. The State*, 3 G. Greene, 519; *Our House No. 2 v. The State*, 4 Id., 172; 37 N. H., 215.

C. C. Nourse, Attorney General, for the State, relied upon *The State of Iowa v. Crogan*, 8 Iowa, 523; and *The State of Iowa v. Maurer*, 7 Id., 408.

WRIGHT, J.—The demurrer was properly overruled. The indictment was against the individual, and not the

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house or building. *State v. Orogan*, 8 Iowa, 523. We find no precedent, either in the text books or cases, requiring a more definite description. 3 Chitty's Cr. Law, 672, *et seq.*; *The King v. Taylor*, 3 B. & C., 502; 2 Hill, 558. Our statute does not require it.

NEWELL V. SANFORD & CHILDS.

1. **ATTORNEY'S FEES.** The successful party in an action on an ordinary contract, in the absence of malice or want of probable cause, is not allowed attorney's fees.

Appeal from Polk District Court.

MONDAY, JUNE 23.

THE fourth clause of defendants' answer is, in substance, as follows: "Defendants show that in the spring of 1855, plaintiff undertook and agreed with defendants to act as their agent, and to procure for them, and in their name, a certain lease of a portion of Lot 12, Block 30, Des Moines, to wit: the one-sixth part of said lot, corner of Second Street and Court Avenue, which lease was held by W. W. Williamson, from one Israel Spencer. Defendants allege that plaintiff, in violation of his said contract and undertaking, fraudulently took the assignment of said lease in his own name, and afterwards commenced a suit in the District Court of Polk county to dispossess them from the rightful possession of said lot. Defendants show that they procured an injunction against the plaintiff in said matter, and were at great expense, loss and trouble, in time, and employment, and paying attorneys in said matter, and in establishing their right, and procuring the title so fraudu-

13	463
105	500
13	463
108	537

lently and wrongfully taken by plaintiff in his own name, to their damage, three hundred dollars."

The cause was submitted to a referee, who, upon this subject, reported the following facts:

1st. That in February, 1855, defendants did constitute plaintiff their agent, to obtain for them the lot referred to in said answer, and that he did procure it, taking the assignment in his own name.

2d. That Israel Spencer held the title to the whole of said Lot 12, Block 30, and in May, 1857, leased to plaintiff a portion of the same, directly west of that covered by the lease to Williamson, mentioned in the answer.

3d. That in July, 1856, plaintiff, claiming to be entitled to the possession of the two lots described in the leases, commenced an action to recover the same.

4th. That defendants set up title in fee simple, by purchase from Spencer, and enjoined the action at law.

5th. That a decree was made thereon, as follows: 1. That plaintiff purchased the first lease for defendants, and that the title was in them. 2. That plaintiff is the owner of the lease from Spencer to him, that by his written consent defendants were entitled to occupy a portion of the same, and the plaintiff the balance. 3. That plaintiff was enjoined, during the term of the Williamson lease, from prosecuting his action for that lot, and also for so much of the other lot as was covered by defendants' buildings erected by plaintiff's consent. 4. That Newell should have possession of his shop, erected by defendants' consent, on the Williamson lot. 5. The referee further found that the defendants incurred expenses and rendered services in defending that action to the amount of \$230, but that as a matter of law, they were not entitled to recover the same in this action.

The report of the referee was confirmed, and defendants appeal.

Nourse & St. John and D. O. Finch for the appellant.

I. Upon issue joined the referee found the facts for the defendants. The judgment, therefore, should have been for the defendants. *Payne v. Potter*, 9 Iowa, 549; *Frentress v. Mobley*, 10 Id., 450.

II. When the plaintiff disobeyed instructions, and took the title to himself he was guilty of a fraud against his principals, and they are entitled to expenses incurred in divesting him of the title. *Story Agency*, §§ 333, 217, 218, and 219. *Dunlap's Paley's Agency*, 2, 6, 8, 18, 23.

III. This court has allowed a like rule of damages in cases of fraud and bad faith in the sale of real estate, *Sweem v. Steele*, 5 Iowa, 352; *Kingsbury v. Smith*, 13 N. H., 211; *Lee v. Dean*, 3 Whart., 330. The principle is fully recognized in allowing counsel fees in a suit upon an attachment bond, for the wrongful issuing of an attachment. *Campbell v. Chamberlain et al.*, 10 Iowa, 337; *Morris et al. v. Price*, 2 Blackf., 459.

C. Bates for the appellee reviewed the authorities cited by counsel for appellant, and contended that they were not applicable to the case at bar.

WRIGHT, J.—The only question in this case, is, whether, under the circumstances, the referee erred in refusing to allow defendants the amount paid to attorneys, and for their own services, in defending against the action of Newell to obtain possession of the property covered by the Williamson and Spencer leases. And we are very clear that this question must be answered in the negative.

There are a few excepted cases, in which counsel fees in former suits are, or may be, allowed. In some instances they have been allowed, as between principal and surety. So, also, where a party has been evicted by action of ejectment, and brings his suit upon the covenant of seisin

Newell v. Sanford & Childs.

contained in his deed. (*Sedgwick*, 96; *Staats v. Ten Eyck*, 8 Caines, 111; *Kingsbury v. Smith*, 13 N. H., 109; *Pitcher v. Livingston*, 4 John., 1; *Swett v. Patrick*, 12 Maine, 9; *Smith v. Compton*, 4 B. & A., 407.) But we have found case, where, as a legal right, they have been allowed in no ordinary cases of contract, in the absence of malice, and want of propable cause. "This principle," says Mr. Sedgwick (96), "is rigorously applied to counsel fees in all cases of contract, and, without discrimination, to both parties to the litigation." He then proceeds to state, that, in some excepted cases, counsel fees in former suits are allowed. But these cases, upon principle and authority, stand upon entirely different grounds from that now before us. (And see *Van Duzen v. Linderman*, 10 John., 106.)

Finally, all the facts being admitted, as claimed by defendants, the legal conclusion does not follow that there was a want of probable cause in the institution of the first action by Newell. We see nothing more in it, than an ordinary case, where a party has been unsuccessful in his action, to the full extent claimed. And when we go one step further, and remember that the question of probable cause is a mixed one of fact and law, (*Center v. Spring*, 2 Iowa, 393,) and that of malice always one of fact, our duty not to interfere with this finding, is most manifest.

Affirmed.

Hull v. McCall.

HULL V. MCCALL *et al.*

1. **ABSOLUTE DEED: MORTGAGE: CONSTRUCTION OF DEED.** Where M. entered lands in his own name, with the money and for the use of H, and afterward conveyed the same to H., by a deed which was never recorded; and H., mortgaged the same to a third party who assigned the mortgage to M., who afterwards acquired possession of the unrecorded deed and destroyed it: *Held*, that M., was a mortgagee merely and could divest H. of his title only by foreclosure.
2. **SAME: TIME ESSENCE OF CONTRACT.** The general rule as to forfeiture of contracts for the conveyance of real estate, when time is made the essence of the same, does not apply to contracts for reconveyance of property conveyed by an absolute deed to secure the payment of a debt.

Appeal from Boone District Court.

MONDAY, JUNE 23.

THE facts are stated in the opinion of the court.

J. M. Ellwood for the appellant.

The bill should be dismissed, for want of equity. The allegations do not show any contract to return the deed, nor any fraud on the part of McCall, in obtaining possession of the same. The complainant without any contract from McCall to return the deed, or any fraud in obtaining it, delivers the same voluntarily to said McCall. He expressly avers that he did so without knowing what was to be done with it. The voluntary action of the plaintiff, in parting with his deed under such circumstances, to his grantor without consideration, when the same had not been recorded, can not be made a ground of equitable relief; certainly the plaintiff stands in no better position, than a party making a voluntary agreement. In such case, equity will not interfere, but will leave the parties where it finds them. 2 Story Eq. Jur., § 706; *Norris v. Slaughter*, 3 G. Greene, 116; *Cravens v. Cravens*, Mor., 285; *Holland et*

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ux. v. Hensley et al., 4 Iowa, 222; *Minturn v. Seymour*, 4 John. Ch., 497. The redelivery of the deed by plaintiff to McCall did not operate to divest the title of the plaintiff to the land. *Jackson v. Anderson*, 4 Wend., 474; *Jackson v. Page*, Id., 585; *Raynor v. Wilson*, 6 Hill, 469; *Nicholson v. Hulsey*, 1 John. Ch., 417. McCall acquired no title to the land by the surrender of the deed to him; and having no title, he could not be decreed to convey one. *Campbell v. Ayres*, 6 Iowa, 339.

The bill may be dismissed upon the final hearing in this court, for want of equity; *Kriechbaum v. Bridges et al.*, 1 Iowa, 14; *Cowles et al. v. Shaw*, 2 Id., 496; *Pierson v. David et al.*, 4 Id., 410; *Moore v. Pierson*, 5 Id., 279.

The plaintiff is only entitled to relief upon the allegations contained in his bill, and if the evidence even shows him entitled to relief, he cannot avail himself of it, unless the facts out of which the equity arises, are set up in his bill. *Crumbaugh v. Smock*, 1 Blackf., 305; 1 Barb. Ch. Pr., 339; *Walker v. Ayres*, 1 Iowa, 449; *Singleton v. Scott*, 11 Id., 589.

The time of the payment being of the essence of the contract, as alleged in the answer, and shown by the evidence of William Pilcher, the failure of the plaintiff to repay to McCall the money at the time stipulated, operated to vest the title to the land in McCall, and he was at liberty to convey it at discretion. *Usher v. Livermore*, 2 Iowa, 117; *Davis v. Stevens*, 3 Id., 158.

Even conceding, however, that time was not of the essence of the contract, still the title passed to McCall, and the bill for a reconveyance of the land, or for removing a cloud upon the title, could not be entertained, or a decree rendered thereon, unless the plaintiff before filing his bill, paid, or offered to pay to McCall the amount paid by him to McFarland upon the mortgage, under the agreement, with the legal interest thereon. The party seeking the aid

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of equity must first do equity. 2 Story Eq. Jur., § 707; *Wells v. Smith*, 7 Paige's Ch., 22; *Stringham v. Brown*, 7 Iowa, 33; *Sloan v. Coolbaugh*, 10 Iowa, 31.

John A. Hull for the appellee. No argument on file.

LOWE, J.—A proceeding in chancery, to quiet and confirm the plaintiff's title to a certain tract of land, therein described. The land in controversy was entered in the fall of 1853, from the general government, by the defendant, Samuel B. McCall, with the funds and for the use of the plaintiff, who at the time and ever since has occupied and improved the same as his own. The certificate of purchase was taken in McCall's name, but he soon thereafter conveyed the land by deed of conveyance to the plaintiff, who did not have the same recorded. About that time the plaintiff was indebted to the defendant, McFarland in the sum of \$97.50 by note, and gave a mortgage on the same land to secure the payment thereof at four months, or the 1st of March, 1854. A little later, this note and mortgage were paid, and taken up by McCall, who became the owner of the claim as against the plaintiff, who, without having it recorded, placed the deed which he had received from McCall for the land in dispute, back into his own hands.

McCall destroys this deed, and subsequently, in 1857, conveys the same land by deed to the defendant, McFarland.

Thus far the facts as stated are not in controversy, but are admitted. The point of divergence in the statements and allegations of the parties, relate to the circumstances and conditions upon which the deed in question had been returned by plaintiff, to the defendant, McCall.

The plaintiff alleges that McCall had obtained possession of said deed from him under some pretext that it was necessary for the protection of his (the plaintiff's) rights, that having confidence in the friendship, intelligence, and good

intentions of McCall, and supposing that he wanted the deed for some legitimate purpose, handed the same back to him, but not for the purpose, or with the expectation, that the same would be canceled or destroyed. Yet that the said McCall had taken advantage of the confidence which he reposed in him, as well as his ignorance of the real object which he, the said defendant, had in procuring the deed from him, and has since retained the deed and not only refused to restore, but had finally destroyed it.

On the other hand McCall claims, in his answer, that the deed had been given back to him, under a special contract, entered into between himself and the plaintiff, to the effect, in substance, that if he, said McCall, would pay to said McFarland, the amount of said note and mortgage aforesaid, that he, plaintiff, would re-deliver to said McCall the said deed, (the same never having been recorded,) and would pay to the said McCall the amount paid by him to McFarland, on said mortgage, on or before its maturity on March 1st, 1854; and that it was agreed that time should be the essence of the contract, and if the said plaintiff should fail to pay the same to said McCall, at the time agreed on, then the land in said deed described, should become the property of the said McCall, and the title thereto should vest absolutely in him. The defendant, McCall, further claims that under this contract he paid off the McFarland mortgage, that he has not been reimbursed for this advancement by the plaintiff, that he destroyed the deed of conveyance which he had received from the plaintiff under the circumstances stated, and subsequently, to wit, in September, 1857, he conveyed the land as his own to the defendant, McFarland.

Assuming the facts to be just as McCall states them, what were his legal relations to the plaintiff? Simply that of a creditor, holding in his hands two securities for the payment of his claim, one, the assigned mortgage of

McFarland against the plaintiff, the other, the plaintiff's title deed to the land in dispute. Suppose default in the payment of the debt at the time specified did occur, was it competent for McCall to destroy this security, and in that way reinvest himself with the title? This is a method of transfer not known to the law. The title he admits was in the plaintiff by deed regularly executed and delivered; we suppose he could only repossess himself again of the title by a voluntary conveyance from the plaintiff, or by a decree of the court, or by a judicial sale. The doctrine in regard to time being the essence of the contract, does not apply to mortgages or title deeds which take the place of mortgages, for under the laws of this State the legal title remains in the mortgagor, of which, although a forfeiture takes place, he cannot be divested, except by a voluntary conveyance, or by sale under a foreclosure.

It is unnecessary, however, to press this point, as the evidence in this case does not sustain the allegation, that time was the essence of the special contract set up in the defendant's answer. The only evidence that bears upon this feature of the contract is to be found in the deposition of the witness Pilcher, the substance of which is as follows:—

“McCall was to pay off the McFarland mortgage, and Hull, the plaintiff, was to pay McCall the amount of the mortgage at a certain time, six, nine, or twelve months, and if he failed to do so, McCall was to have the land,” or, “he was to use his own pleasure in keeping it.” This comes quite short of proving the allegation. See *Matthews v. Gilliss*, 1 Iowa, 242. It is claimed, however, that the defendants' answer being called for under oath, proves it, being equal to the testimony of one witness; the reply to this, however, is that this part of the defendant's answer was not responsive to the bill, but that it is new matter,

which is denied in the replication, and therefore cannot have that effect.

Besides all this, there is considerable other evidence showing that the defendant, McCall, recognized the plaintiff as the owner of this land, long after the time when the same should have been forfeited under the contract.

The plaintiff claims in his petition that he had paid McCall the amount of money which he had advanced to McFarland on the mortgage. This is denied, and alleged, on the other hand, that the money which the plaintiff paid had been applied on his store account, and upon this feature of the case a large amount of evidence was introduced, and made to figure extensively in the cause; but, as we view the matter, it has no necessary connection with the case. The question is, whether, if he had not paid the money, the defendant, McCall, was justified in destroying his title deed, usurping absolute dominion and ownership over his property, and even conveying it away to a third person.

There can be but one answer to this question, and the court below did not err in decreeing that the deed of conveyance from McCall to McFarland for the land in controversy should be set aside and canceled, and that McCall should restore or make to plaintiff another deed of conveyance for the same land, leaving the parties to adjust amicably or by suit their respective money claims against each other.

The decree entered in this case, therefore, will be

Affirmed.

THE STATE OF IOWA v. GEBHARDT.

1. **INSTRUCTIONS A PART OF THE RECORD.** The Supreme Court will not review instructions which have not been made a part of the record, either by the signature of the judge, as contemplated by §§ 4813 and 4814 of the Revision, or by being incorporated into a bill of exceptions.

Appeal from Des Moines District Court.

MONDAY, JUNE 23.

INDICTMENT for leasing a house for prostitution and lewdness. The jury returned a verdict of guilty, whereupon the defendant filed a motion in arrest of judgment, upon the ground that the court erred in giving, modifying and refusing instructions. The motion was overruled, and defendant appeals.

M. D. Browning and *B. J. Hall* for the appellant.

C. C. Nourse, Attorney General, for the State, relied upon Rev., 1860, §§ 4813 and 4814; *The State of Iowa v. Hand*, 7 Iowa, 411; *Harmon v. Chandler*, 3 Iowa, 150; *Farr v. Fuller*, 8 Iowa, 347.

BALDWIN, C. J. — The counsel for defendant assign as error the giving of certain instructions by the court, and the refusal and modifications of those asked by the defendant. Sections 4813 and 4814 of the Revision provide that the instructions given by the court, as well as those asked by counsel, shall be in writing, and signed by the judge and filed with the clerk. If instructions asked are given, or refused, or modified, they must be so marked and signed by the judge.

The record in this case fails to show that the instructions given or refused, were either signed, or made a part of the record, as thus provided.

 Fromme v. Jones.

The counsel of defendant, in their motion for a new trial, refer to the action of the court in giving and refusing certain instructions, and upon such ruling base their application for a new trial, to the overruling of which motion defendant excepted, and a bill of exceptions is signed by the court, showing its ruling upon this motion. It does not appear, by the bill of exceptions, that the instructions which are claimed to be erroneous were in any way made a part of the record. The counsel, it is true, state in their motion that certain instructions were given, and others refused; but the mere averment of counsel that certain rulings were made by the court, does by no means compel us to consider such averment as true. The law requires it to appear over the signature of the judge what instructions were given or refused, and we have no power to consider an instruction as either given or refused, unless it is so certified by the court.

Judgment affirmed.

18	474
79	394
13	474
89	147
13	474
102	739

 FROMME V. JONES.

1. RECORD OF MORTGAGE. When a mortgage was executed in the name of a firm by the sole member thereof, and was recorded as a mortgage executed by such member individually, it was held sufficient to impart notice.
2. SAME: CHATTEL MORTGAGE. The recording of a chattel mortgage is not essential when the possession of the mortgaged property passes to the mortgagee at the time of the execution of the mortgage.
3. MORTGAGE BY A PARTNER. One partner may sell or dispose of co-partnership property for the payment or security of a co-partnership debt.
4. ERROR WITHOUT PREJUDICE. The judgment of a court will not be reversed for an error which did not prejudice the appellant.

FROMME v. JONES.

5. **MORTGAGE NOT FRAUDULENT.** A mortgage of all the property of the mortgagor to secure the payment of one debt, if made in good faith, is not fraudulent, even when the mortgagor is insolvent; neither is it void as an assignment for the benefit of a preferred creditor.
6. **POSSESSION OF MORTGAGED PROPERTY.** A reservation by a mortgagor of personal property of the possession of the mortgaged property, with the right to dispose of the same by sale, is not *per se* fraudulent, following *Kuhn v. Graves*, 9 Iowa, 303; *Campbell v. Leonard*, 11 Iowa, 489; *Wilhelmi v. Leonard*, *ante*.
7. **REFORMING VERDICT.** A verdict defective in form may be reformed by the court when the intention of the jury can be ascertained from data given in the verdict, or referred to in the pleadings; but the court cannot supply an omission to name the amount of the finding by reference to evidence outside the record.

Appeal from Marion District Court.

MONDAY, JUNE 23.

THE plaintiff sued the defendant in trespass, for seizing and conveying away certain personal property of which he claims to be the owner, and to be entitled to the possession thereof.

The defendant justifies the taking, by alleging that he levied upon the same as the property of Samuel Altheimer & Co., under certain writs of attachment issued by the creditor of said firm. The plaintiff claims title, and the right to the possession of said property, by virtue of a chattel mortgage executed by said firm prior to the seizure by the said defendant under the said writs.

Exceptions were taken by the defendant to the ruling of the court in reference to the admissibility of certain evidence at the trial, and in giving and refusing certain instructions, and to the judgment of the court upon the verdict. Judgment for plaintiff. Defendant appeals.

Fromme v. Jones.

J. E. Neal and C. C. Cole for the appellant.

I. If the instrument in question is, as is claimed, a chattel mortgage, it is void, because: 1. It is not properly executed, if the deed of Samuel Altheimer. 2. It is not properly executed and acknowledged if the deed of Samuel Altheimer & Co. 3. It was not filed, or, if filed, the filing was not done in a manner which made it notice to third persons.

II. While the instrument may be a chattel mortgage or bill of sale when examined by itself, and tested by its own language, yet when taken in connection with other facts and connecting circumstances, such as the insolvency of the grantor, the conveyance by the bill of sale or mortgage of substantially all his property, that he was largely indebted to others, &c., it might be found to be in effect a general assignment. *Cowles v. Ricketts*, 1 Iowa, 582; *Bebb v. Preston*, Id., 460; *Burrows et al. v. Lehnendorff*, 8 Id., 96.

III. The verdict was insufficient to sustain the judgment; the defect in the verdict could not be reformed by the court.

C. C. Nourse, S. A. Rice, and Matthews & Atherton for the appellee.

The certificate of the recorder of deeds upon the back of the instrument is *prima facie* evidence of its having been properly indexed and recorded. *Anthony v. Butler*, 13 Pet., 485; *Tracy v. Jenkins*, 15 Pick., 465; *Ames v. Phelps*, 18 Pick., 814; *Morey v. McGuire*, 4 Verm., 327; *Parsons v. Boyd*, 20 Ala., 112; *Hastings v. Turnpike Company*, 9 Pick., 20. Actual notice or possession of mortgaged personal property renders evidence of the recording of the instrument unnecessary. *McGavran v. Haupt*, 9 Iowa, 84; *Crawford v. Burton*, 6 Id., 478. One partner may sell or

Fromme v. Jones.

mortgage the entire stock in trade without the consent of his copartners, and such sale or mortgage is good against creditors. *Topley v. Butterfield*, 1 Met., 515; *Hodges v. Harris*, 6 Pick., 360; *Quiner v. Marblehead Social Insurance Company*, 10 Mass., 476; *Lamb et al. v. Durant*, 12 Id., 54. A power of sale vested in the mortgagee by the terms of a chattel mortgage does not make the instrument an assignment, or render it invalid as against other creditors. *Bartels v. Harris*, 4 Greenl., 146; *Parks v. Hall*, 2 Pick., 206; *Clark v. Whitaker*, 18 Com., 543; *Gordon v. Massachusetts Fire and Marine Insurance Company*, 2 Pick., 249; *Peters et al. v. Ballistier et al.*, 3 Id., 495; *Abbott v. Goodwin*, 7 Shep. (Maine), 480; *Melvly v. Chandler*, 3 Fairfield (Maine), 282; *M. & M. Bank v. Bank of Penn.*, 7 W. & S., 385; *Baker v. Hall*, 13 N. H., 298; *Chowing v. Cox*, 1 Randolph, 306. A provision in a chattel mortgage, that after the payment of the mortgaged debt the property unsold shall revert to the mortgagor, does not render it invalid as to other creditors. *Leitch v. Hollister*, 4 Cow., 216; *Marsh v. Lawrence*, 4 Cow., 461; *Bissell v. Hopkins*, 3 Id., 166; *Torbert v. Hayden*, 11 Iowa, 445. The fourth instruction as to the character of the instrument under which plaintiff claims, is fully sustained in the cases of *Kuhn v. Graves*, 9 Iowa, 303; *Torbert v. Hayden*, *supra*; *Campbell v. Leonard*, 11 Iowa, 490.

BALDWIN, C. J.—The counsel of appellant assign twenty-four causes of error, and claim a reversal of the judgment upon each error assigned. In order to determine many of the questions presented, it would be necessary to have before us the evidence upon which many of the alleged erroneous rulings were made. This the appellant fails to bring up.

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There are, however, several questions raised by the bills of exceptions, that are fairly presented, and which it is important to consider in the final determination of the cause.

The chattel mortgage, upon which plaintiff relies as establishing his title to the property in controversy, and which was introduced in evidence upon the trial, purports to have been executed by Samuel Altheimer & Co. The record shows that it was signed by Samuel Altheimer alone. The recorder, in recording the same, omitted the words "& Co." It is claimed by appellant that the chattel mortgage to plaintiff as thus recorded was no notice to subsequent purchasers or attaching creditors, of any rights of plaintiff acquired thereby.

To this position it is well answered, that in the amended petition of plaintiff it is alleged that the firm of Samuel Altheimer & Co. was composed of but one person alone, Samuel Altheimer, that the "& Co." was a fiction, attached for the mere purpose of show or effect. This averment is denied by the defendant. If the proof, however, established this fact, (and we do not know but that it did,) then the mortgage as recorded was sufficient notice of the sale to plaintiff. Again, the object of the record of a chattel mortgage is to give notice to creditors or purchasers of such sale, and that the right to the possession has passed out of the debtor. The plaintiff avers in his petition that he took possession of the property mortgaged as soon as the mortgage was executed, and that the defendant had actual notice of the sale to plaintiff, and his right to the possession, when the levy by defendant was made. If this was proved on the trial, it is immaterial whether the mortgage was recorded or not. Conceding, however, that the instrument was signed by but one member of the firm, we are not prepared to say that such sale does not convey to plaintiff the title and possession of the property so sold. The debt secured was a debt made and contracted in the

firm's name, and the securing or paying of such debt by sale, absolute or otherwise, was a part of the legitimate business of said firm. The question as to the rights of the other partner can be raised only by some person who claims through him. There can be no doubt as to the rule, that, as between creditors, one partner may sell or dispose of partnership property to secure partnership debt. See 12 Mass.; 476, and cases cited by counsel. We assume, then, that the court did not err in the admission of this evidence, notwithstanding the fact that it was improperly recorded, for the reasons as above stated, without determining whether the mortgage, or the subsequent creditor or purchaser, must suffer from the omission of the recorder.

It is next objected that the court refused to permit the defendant to show that the mortgage to plaintiff was not recorded or indexed in a book kept by the recorder, as is required under chapter 76 of the Revision, exclusively for the recording or indexing of chattel mortgages. The bill of exception shows that when the plaintiff introduced the mortgage in evidence, the defendant then objected, and offered to introduce the records then in court to show that said mortgage was not recorded in such a book as was required by law. The court refused the defendant this privilege at that time, holding that it was not then the proper time for defendant's evidence. The exceptions show, however, that this evidence was subsequently received. We see no error in this ruling. The evidence was afterwards admitted, and if the court erred it was error without prejudice, and, as above stated, if the defendant had actual notice, it was immaterial whether the mortgage was recorded or not.

The next error we propose to consider relates to the giving and refusal to give certain instruction involving the construction of this instrument.

It is claimed by the counsel that this writing is but an assignment for the benefit of creditors, and as such it is void under our statute, as it was not made for the benefit of all of the creditors of said firm.

The court, in its instructions given, charged the jury that if they found that Altheimer was indebted to plaintiff in the sum specified in the mortgage, and that the object of the mortgage was in good faith to secure and provide for the payment of said debt, then the said mortgage was not fraudulent, even though it preferred the debt of Fromme to that of other creditors, and even though Altheimer was insolvent at the time. The instruction asked and refused was, in substance, the converse of this one given, that is, the court was asked to say to the jury that if the property conveyed was all of the property of said firm, and that they were insolvent at the time, and owed other parties for which no provision was made, that such transfer was an assignment, and, under the statute, void.

A debtor has a right to secure his creditor at any time, without reference to the claims of other creditors, provided, always, that he acts in good faith, and without any fraudulent design. Hence he has the power to sell and transfer all of his property for this purpose. If he has the power to sell absolute, he has the power to incumber by mortgage. Our statute expressly provides for the transfer of property under a chattel mortgage. If the sale is absolute, there is no necessity for any bill of sale, or other instrument of writing, if the possession accompanies the sale. If the vendor, however transfers the property as security, with the agreement that he is to repossess the property when the debt secured is paid, then the bill of sale must conform to the provisions of the law. If the law is complied with, the mortgagee holds the property subject to the payment of the debt secured. The question as to the power and right of the mortgagor to retain possession of and dispose of the

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property mortgaged, by sale, if done in good faith, has been clearly recognized by this court in the cases of *Kuhn v. Graves*, 9 Iowa, 303; *Torbett v. Hayden*, 11 Iowa, 445; *Campbell v. Leonard*, 11 Id., 490; *Wilhelmi v. Leonard*, *ante*.

When this property was transferred, the law, as found in chapter 62 of the Code, was in force. A general assignment for the benefit of creditors under this provision, is a different thing from that of a chattel mortgage. An assignment passes the property beyond the control of the debtor. It is made in contemplation of insolvency. It requires the intervention of a trustee. If the property assigned is insufficient to pay the whole of the indebtedness, there must be a *pro rata* distribution of the avails of the property assigned. The character and design of a chattel mortgage is not the same as an assignment. By the chattel mortgage, the debt to particular individuals is merely secured. The mortgagor does not lose, but retains, the actual possession of the property, although the right to such possession as against other parties is in the mortgagee. The mortgagor can repossess the title to the property at any time by paying the debt secured. Nor is the making of a chattel mortgage, any evidence of insolvency. The mortgage, in this case, was made to secure a *bona fide* indebtedness. It was duly executed and acknowledged. It has every requisite of a chattel mortgage, and we cannot see wherein the court erred in instructing the jury that they must so consider it. The instrument in the case of *Burrows v. Lehdorff*, 8 Iowa, 101, construed by this court as an assignment, was made under different circumstances, than the one in this case. There the debtor attempted to execute bills of sale or mortgages to various creditors, making one subject to another, recording one a few minutes after the other, and without any knowledge or consent thereto by the creditors.

The counsel of appellant, who closes the argument in this court, relies upon one point out of the whole number of errors assigned, which we think is the only one raised upon which a reversal can be asked. This relates to the verdict of the jury. This verdict reads as follows: "We, the jury, find for the plaintiff, the amount the goods were appraised at the time the sheriff levied upon them." Upon this verdict, the court rendered judgment for the sum of thirty-one hundred dollars. The judge, in the bill of exceptions, states that the judgment was rendered upon this verdict for said sum, as it appeared to the court by the written appraisement attached to the return of the sheriff, to be the amount at which the goods were appraised at the time the sheriff levied upon the goods, which said appraisement value was shown to the court during the progress of the trial, at which said verdict was rendered by the jury.

The defendant was present, and objected to the action of the court in putting said verdict in form, and rendering judgment as it did thereon. Sections 1788, 89 and 90, provide that when an action is for the recovery of money, only the jury shall assess the amount of the recovery. The verdict may be put in form, if necessary. The verdict shall be sufficient in form, if it express the intention.

Under this law, it has been held by this court, that the verdict may be put in form if it can be definitely ascertained by the court from the data given by the jury, the amount they intended to find. As, for instance, when the suit is upon a promissory note, and the jury finds for the plaintiff the amount due on the note sued upon. The court in such a case, has sufficient data from which the intention of the jury can be determined. See *Stewart v. Campbell*, 6 Iowa, 538; *McGregor et al. v. Armill*, 2 Id., 30. Indeed, it is a general rule, that although a verdict does not conclude formally in the words of the issue, yet if the

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point in issue can be collected from the finding, the court will put the verdict in form. See *Porter v. Rumney*, 10 Mass., 64. When, however, the amount cannot be definitely ascertained by reference to the pleadings, or to some certain data given by the jury, the court cannot assume the power to fix the amount of the judgment.

Did the court in this case, in putting the verdict in form, or in fixing the amount of the judgment, express the manifest intention of the jury? Had it a positive data upon which to base the amount of such judgment?

In the case of *Coffin v. Jones*, 11 Pick., 48, WILDE, J., says: "It is undoubtedly true that a mere formal defect in the verdict is immaterial. It is not necessary that it should follow the precise language of the issue, but it must be responsive to it, and so expressed as to render it certain that the jury decided the question or questions submitted to them, and any uncertainty upon this point is fatal." In the case of *Mays v. Lewis*, 4 Texas, 38, there was a verdict for the plaintiff, in the following words: "We, the jury, impaneled, &c., render a verdict in favor of Lewis to the effect that the said Lewis shall be entitled to the full amount specified in the promissory note adduced in the case, and drawn by said Mays in favor of said Lewis, together with the legal interest due thereon, making deduction of all amounts indorsed on them as paid." The court, in their opinion, say: "If the meaning of the jury in this verdict is certain and definite, or furnishes sufficient facts to enable the court to render the intention certain, the judgment ought not to be set aside, if it conforms to the finding of the jury." The court then refers to the rule laid down by the Supreme Court of Kentucky, in the case of *Miller et al. v. Shackelford*, 4 Dana, 271; "that in considering the verdict itself with a view to its sufficiency, the first object is to ascertain what the jury intended to find, and this is to be done by construing the verdict liberally, with the sole view

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of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings." The court, in the case of *Mays v. Lewis*, proceeded to say: "In the case before us, after giving the benefit of the rules cited, can the verdict be sustained? We are constrained to say, that from the best reflection we have been able to give the question, and with a strong inclination to sustain it, we find nothing in the verdict or in the record to render it certain. The difficulty arises from the words, 'adduced in the case.' If, instead of these words, the jury had said, 'set out in the petition,' or had made direct reference to the notes described in plaintiff's petition, there could have been no difficulty in finding that it was sufficiently certain. If the jury meant the notes read in evidence, we should be left totally at a loss to know what notes were referred to, whether two, or all three of the notes set forth in the petition, or some other notes. The verdict fails to furnish any such certain data by which to make it certain, and the court was unwilling to extend the rule further than it had been extended."

This case is not unlike the one before us. Reference is made by the jury to an appraisement. There were several appraisements attached to the returns of the sheriff offered in evidence. It nowhere appears in the record what the amount of the whole of such appraisements or either of them were. The court, to ascertain the intention of the jury, must go outside the record, and weigh conflicting evidence, to determine this amount.

The judge states, in the bill of exceptions, that the amount of this judgment was ascertained from the appraisement attached to the returns. An additional bill of exceptions states that the appraisement attached to the return of the said sheriff were excluded from the consideration of the jury, upon motion of the plaintiff. If so, it should not be considered by either the court or jury as a data upon which

to base the amount of the judgment. There is nothing more definite about this verdict than if they, the jury, had merely found for the plaintiff, which would possess no positive data upon which the court could render judgment. It would certainly be a dangerous precedent to recognize the right of the court, upon such an indefinite verdict, to fix the amount of the judgment, and one we feel unwilling to favor, in the least.

It is claimed that the record entry made by the clerk shows that the verdict was in due form, and that when the bill of exceptions and the record conflict, the latter must prevail. The bill of exceptions is a statement made by the court, and when filed becomes a part of the record. The exceptions contain the action of the court prior to the final order of judgment, or before the verdict is put in form and entered up by the clerk. The entry by the clerk contains the final order of the court; but this entry does not necessarily compel us to conclude that the bill of exceptions is in any respect untrue.

For the reason that the verdict was too indefinite to justify the judgment by the court, this cause is reversed, and a new trial awarded.

Reversed.

18	485
79	112

THE STATE OF IOWA V. BITMAN.

1. **ASSAULT AND BATTERY: INFORMATION.** An information charging a defendant with inhumanly whipping and beating his own child, is sufficient as an information charging an assault and battery; but it should set out the name of the person upon whom the offense was committed.

Appeal from Lee District Court.

WEDNESDAY, JUNE 25.

THE facts appear in the opinion of the court.

No appearance for the appellant.

C. C. Nourse, Attorney General, for the State.

BALDWIN, C. J.—The information upon which the defendant was arrested, tried and convicted, charges him with cruelly and inhumanly whipping and beating his own child, being about three years old.

A demurrer to this information was filed in the justice's court presenting several objections to its sufficiency, only two of which we deem it important to consider: first, because it did not charge the public offense of assault and battery, second, because the name of the person upon whom the offense was said to have been committed, was not given.

This demurrer was overruled by the justice, and the bill of exceptions shows that upon appeal, the same objections were made and overruled in the District Court.

The information is not objectionable upon the first ground named. The language used is sufficient to indicate that the offense had been committed. It is not required that the information should state in so many words that the defendant was guilty of the offense of an assault and battery. It is the right of a parent to chastise his child, but when such chastisement amounts to cruelty or inhumanity, or where, as the court below charged the jury, the parent or master goes beyond the line of reasonable correction, his conduct becomes more or less criminal.

Cruelly and inhumanly whipping implies an unlawful and willful assault and battery. Any words used in the

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information which substantially and plainly set forth the acts of the defendant which amount to an offense, are sufficient.

The second objection is, that the name of the person upon whom the offense was committed is not given. This omission renders the information defective. It would, without doubt, invalidate an indictment, if the state should fail to allege therein upon whom the offense had been committed.

The form of an information, as given in § 5058, of the Revision, seems to contemplate that the act or omission constituting the offense with the venue and names and date, should be stated with as much precision as in an indictment. The defendant should be advised of the name of the person upon whom the assault has been committed, so that he can prepare his defense accordingly.

The information should be so specific that if the defendant is so convicted or acquitted, he could plead such conviction or acquittal in bar of any further prosecution for the same offense.

Reversed.

McKELLAR *et al.* v. STOUT.

1. INDEFINITE DEMURRER. Where a demurrer to a petition at law set out two causes: "That the matters set forth in said petition do not constitute any cause of action against the defendant; and that said petition does not show such a state of facts as will justify the court in granting any relief by judgment or otherwise, to said plaintiff," it was held, that it should have been disregarded by the court.

Appeal from Dubuque City Court.

WEDNESDAY, JUNE 25.

ACTION to subject the property of the defendant to the satisfaction of a judgment, against the Dubuque Times Company, a corporation in which he was a stockholder.

The defendant demurred to the petition for causes stated in the opinion of the court. The demurrer was sustained, and the plaintiff appeals.

Griffith & Knight for the appellant.

Bissell, Mills & Shiras for the appellee.

BALDWIN, C. J. — The Revision, § 2877, provides that the defendant may demur to the petition only when it appears on its face, either:

First, that the court had no jurisdiction of the defendant or of the subject of the action, or

Second, that the plaintiff has no legal capacity to sue, or

Third, that the petition does not state facts sufficient to constitute a cause of action, &c. Section 2877 provides that the demurrer must distinctly specify, and consecutively number, as the ground of objection, some matter of error intended to be argued as a defect in the pleading. Unless it do so, it shall be disregarded, and it shall not be enough to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition for the fifth reason of § 2876, may be stated in the terms thereof.

Unless the proceeding, therefore, is an equitable one, or if the petition is at law, a demurrer thereto, which merely states that the petition does not state facts sufficient to constitute a cause of action, should be disregarded by the court. The petition, in this case, was not for relief in equity, but was a proceeding at law.

The causes of demurrer, are:

First, that the matters set forth in said petition do not constitute any cause of action against defendant.

Second, that said petition does not show such a state of facts as will justify the court in granting any relief, by judgment or otherwise, to said plaintiff.

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The defendant fails by this demurrer distinctly to specify the grounds of objection to the petition, or the matter of error intended to be urged as a defect in the pleading. The causes of demurrer are such as the law expressly states that the court shall disregard.

There can be no question as to the proper construction of this plain and imperative provision of the statute.

The court should have disregarded, and not sustained, the demurrer. The question, therefore, as to whether the plaintiff, by his pleading, shows that he is entitled to a recovery, cannot be considered.

Judgment Reversed.

13	489
136	611

THE STATE OF IOWA v. WATROUS.

1. **WILLFUL TRESPASS: INDICTMENT.** In an indictment for willful trespass in cutting down and destroying timber on the land of another, one statement of the venue is sufficient; and when it is averred as being upon the land of a certain person named, and described by section, township and range, omitting its situation with reference to the nearest meridian line, it is sufficient if the county in which it is situated is set out.
2. **SAME.** An indictment is sufficient when the offense is charged with such certainty, and in such manner, as to enable a person of common understanding to know what was intended, and the court to pronounce judgment according to the law of the case.
3. **SAME.** In an indictment for willful trespass by cutting down and destroying timber, it is sufficient to allege that the injury was done by cutting down and destroying, without being more specific.
4. **SAME: CHARGES IN DIFFERENT FORMS.** An indictment may charge an offense in different forms, to meet the testimony; and if it may have been committed in different modes or by different means, these may be alleged in the alternative; but in charging an offense in different forms, the pleader is not compelled to use the alternative form of expression.

The State of Iowa v. Watrous.

5. **DEED AS EVIDENCE.** In the trial of an indictment for willful trespass by cutting down and destroying timber in which the meridian of the land injured was not named, a deed in which the meridian was named was not held inadmissible for that reason.
6. **WILLFUL TRESPASS: EVIDENCE.** In the trial of an indictment for willful trespass in cutting down and destroying timber, evidence of the value of the timber destroyed is admissible.
7. **NOTICE OF INTRODUCTION OF WITNESS.** The defendant in a criminal cause who has accepted the service of a notice that a witness not named in the indictment will be introduced on the trial, and who has agreed to treat such notice as personally served, cannot object that it was not signed by the district attorney.
8. **INSTRUCTIONS: PRACTICE.** Instructions which are not signed by the judge, nor filed with the clerk, and which are not marked either "given" or "refused" will not be considered by the Supreme Court.
9. **JUDGMENT ON VERDICT WITHIN THREE DAYS: PRACTICE.** When the record shows that a judgment was rendered upon a verdict in a criminal cause in less than three days after the verdict was returned by the jury, and that the court continued in session for more than that time, the Supreme Court will, unless all presumptions of prejudice are clearly rebutted, remand the cause, not for a new trial, but for another judgment.

Appeal from Polk District Court.

WEDNESDAY, JUNE 25.

THIS indictment contains two counts. The first accuses the defendant of the crime of willful trespass, by cutting down and destroying timber and wood on the land of another, for that he did on, &c., in the county of Polk, &c., unlawfully and willfully cut down and destroy timber and wood standing and growing on the land of one William C. Allen, to wit: the N. E. quarter, &c. The second is like the first, except that the charge is for carrying away timber and wood, being upon the land of the said Allen, &c.

Trial, and verdict of guilty on both counts, and defendant appeals.

Phillips & Phillips for the appellant.

I. The indictment is under § 4324 of the Revision of 1860. This statute does not describe the offense in detail, and it is not sufficient to employ the words of the statute alone in an amendment. The offense must be described with the particularity required by common law. *The State v. Jackson et al.*, 7 Ind., 270; *King v. Mason*, 2 T. R., 581.

II. The record does not show that the District Court of Polk county, had any jurisdiction of the supposed offense. The indictment does not in any manner fix the locality of the land described in the indictment; nor does it show that the lands are in the State of Iowa, except by implication from the allegation, "that the defendant in the county of Polk committed a trespass." *Ensign v. Shurman*, 13 How. Pr. R., 37; *McMurry v. Gifford*, 5 P. R., 14; *The State v. Williams*, 4 Ind., 234; 1 Chit. Cr. L., 298.

III. An indictment for malicious mischief must state clearly and directly to whom the property belonged, and this is not to be taken by implication. *Read v. The State*, 1 Ind., 511, cited and approved, 7 Ind., 157; *The State v. Jackson*, Id., 270. It must also show the specific injury done the property. *The State v. Aydelott*, 7 Blackf., 157; and the amount of such injury, *The State v. Pendon*, 2 Id., 371.

IV. The indictment was bad in alleging the same offense in two counts or statements, showing that the same offense was committed by different modes and by different means, and did not allege those modes and means in the *alternative*, as provided by § 4354, Revision of 1860.

V. The record shows that the verdict was returned and judgment was rendered on the same day. Revision of 1860, § 4862.

C. C. Nourse, Attorney General, for the State.

I. The cases cited by counsel for appellant in support of the first proposition, arose under a statute in which the offense is described as "malicious trespass." Our statute sets out the very manner of the offense, as cutting down and carrying away timber.

II. The court will take judicial notice of the legal subdivision of lands and of government surveys. *Wright v. Phillips*, 2 G. Greene, 191; Rev., 1860, § 4661.

III. The same particularity is not required in an indictment for a misdemeanor, and the words "then and there" are not necessary after the venue is once properly laid. Rev., 1860, § 4659, pt. 3; § 4660, pt. 1.

IV. The indictment alleges that the trespass was upon "the lands of Wm. C. Allen," and this was a sufficient allegation of ownership. Rev., 1860, §§ 4657, 4650, pt. 2; *Moyer v. The Commonwealth*, 7 Barr, 439, cited in note 2; Whart. Am. Cr. L., § 1989.

V. The case of *The State v. Pendon*, 2 Blackf., 371, was under a statute which provided that a fine "in twice the value of the property destroyed" should be the penalty. Hence the reason of the decision, which is not applicable under the statute of Iowa.

VI. The defendant was not prejudiced by the rendering of the judgment before the expiration of three clear days after the verdict. *The State of Iowa v. Marvin*, 12 Iowa, 499. At all events the cause can be remanded only for judgment on the verdict. No new trial will be awarded.

WRIGHT, J. — 1. That the venue is alleged with sufficient certainty in this indictment, we entertain no doubt. The place, as well as the time, is once stated, and need not, therefore, be afterwards alleged. (§ 4660.) From the language used, the mind can readily understand that the offense was committed within the jurisdiction of the District Court

of Polk county. The failure, in the description of the land, to locate it west of the fifth meridian, is of no importance, for aside from this the county is clearly stated, and we know that if in Polk county, it must be west of that line.

II. The statute provides that: "If any person willfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another, or by carrying away timber or wood being on such land, he shall be punished," &c. The language of this indictment is concise, and is sufficient to enable any person who will give it a fair and ordinary construction, to know that the timber destroyed was upon the land owned by William C. Allen. To say that it means anything else, or that it does not convey this thought to the mind, we should have to warp its meaning, and disregard the plain reading of the statute, for it is declared that if an offense is charged with such certainty and in such a manner as to enable a person of common understanding to know what was intended, and the court to pronounce judgment according to the law of the case, the indictment is sufficient. (§ 4659.) *State v. Hintermeister*, 1 Iowa, 101.

III. It was not necessary to more particularly state the specific injury to the property. The language of the statute is followed, and this is sufficient. Indeed, it is difficult to perceive how the pleader could have been more specific. When it is alleged that the timber was cut down and destroyed, the sum of all other injuries thereto is included. The statute of Indiana, under which *The State v. Pendon*, 2 Blackf., 371, was decided, fixed the punishment at a sum not exceeding twofold the value of the property destroyed, and hence the necessity of averring the value in the indictment. But the specific means made use of to effect the injury, need not be stated. *State v. Merrill*, 3 Blackf., 354. And see *State v. Seamans*, 1 G. Greene, 418; *Same v. Chambers*, 2 Id., 308; *Same v. Douglass*, 7 Iowa, 443.

IV. An indictment may charge an offense in different forms, to meet the testimony, and if it may have been committed in different modes or by different means, these may be alleged in the alternative. (§ 4654.) In charging an offense in different forms, the pleader is not compelled to use the alternative form of expression. This indictment does not violate the requirements of the section referred to, but, on the contrary, is clearly sustainable by its letter and spirit, and the following cases: *State v. Abrahams*, 1 Iowa, 117; *Same v. Vaughn*, 5 Id., 369; *Same v. Walters*, Id., 507; *Same v. Cokely*, 4 Id., 477; *Same v. Troogood*, 7 Id., 252; *Same v. Barrett*, 8 Id., 586; *Same v. McPherson*, 9 Id., 53.

V. It was no valid objection to the evidence of title in *Allen*, ~~that the~~ "certified transcript of original entries" and deeds, described ~~the land~~ as being west of the 5th principal meridian. True, the indictment did not name the meridian, but such evidence does not conflict with the description given. And in this connection we remark, ~~that~~ evidence as to the value of the timber destroyed was admissible, if for no other purpose, to enable the court to fix the punishment. (§ 4875.)

VI. A witness was offered, who was not examined before the grand jury. Notice of the intention to introduce this testimony was given under § 4786 of the Revision. The witness was objected to, but upon what ground is not stated. It is now urged, however, that the notice was not served by the District Attorney. It seems that the notice was signed by "P. Gad Bryan, District Attorney for the 5th Judicial District, by S. V. White." Defendant accepted due and legal service of the same, and agreed to treat it as if personally served, on the day named. Under such circumstances, the objection was untenable.

VII. It is claimed that the court erred in giving certain instructions. We find what purports to be instructions in

the transcript, but whether they were given or refused, does not appear. Upon this subject, see *State v. Gebhardt, ante*. In this instance, the instructions are not marked, either "given or refused," signed by the judge, nor filed with the clerk. They cannot be considered, therefore.

VIII. It is finally claimed that the judgment was pronounced within less than three clear days after the verdict was recorded. This question was made in the case of *The State v. Marvin*, 12 Iowa, 502. There, however, the record failed to show that the term continued three clear days after the rendition of the verdict, and we could not, therefore say, that there was error, in view of the provisions of the statute. (§ 4861.) In this case, the record tends to show that the court remained in session for about three weeks after the reception of the verdict. This is not controverted by the Attorney General, and is therefore regarded by us, for the purposes of this case, as true.

It seems that the defendant was arraigned for judgment more than six hours "after the bringing in of the verdict." But the statute is imperative, that, if the court remains in session so long, "the time appointed for judgment, must be at least three clear days after the verdict is recorded," but in no case can it be pronounced in less than six hours thereafter. (§ 4861.) Unless the record quite clearly rebuts all presumption of prejudice, we do not see how we are to disregard these plain requirements. The language of the statute is imperative. The reason for it, we can readily apprehend. With its wisdom, we have nothing to do. The presumption of prejudice is not sufficiently rebutted in this instance, and, we therefore, feel constrained to remand the cause, not for new trial, but for judgment upon the verdict, defendant having leave to show cause against the same, but not such as have already been passed upon by the court below.

North & Scott v. Mudge & Co.

NORTH & SCOTT V. MUDGE & CO.

1. **CONFESSION OF JUDGMENT AGAINST A FIRM.** A confession of judgment by one member of a copartnership, for the firm, is valid only against the copartner making it.
2. **MERGER.** When a demand of an inferior degree is changed into one of a higher character the former is merged into the latter.
3. **SAME: COPARTNERSHIP.** A judgment against one partner upon a demand against the firm, is a bar to another action upon the same demand against the firm.

Appeal from Wapello District Court.

WEDNESDAY, JUNE 26.

THE facts are stated in the opinion of the court.

Clinton and Nourse for the appellant.

A confession of judgment by one partner, in the name of the firm, without the consent of his copartners, is valid against the party making the confession. *Crane v. French*, 1 Wend., 312; *McBride v. Hagen & Barrett*, Id., 326; *Green v. Beals*, 3 Caines, 254. The judgment against Mudge was a complete bar to another suit against the firm. *Robertson v. Smith*, 18 John., 459; *Sloo v. Lea*, 18 Ohio, 279; *Smith v. Black*, 9 S. & R., 142; *Mann v. McNutty*, 2 Gilm., 353; *Moal v. Hollins*, 11 Gill & John., 11; *Warf v. Johnson & Thomas*, 13 Mass., 148; *Taylor v. Claypool*, 5 Blackf., 537; *Thornton v. Thompson*, 15 Ills., 416.

Knapp & Caldwell for the appellee.

LOWE, J.¹ On the 11th day of October, 1852, the defendants, A. Mudge & Co., made and delivered their promissory note to the order of plaintiffs, for the sum of

¹ BALDWIN, C. J., being related to one of the defendants, took no part in the determination of this cause.

\$836.50, payable six months after date. Prior to the 12th day of August, 1854, credits to the amount of \$256.50 were entered upon said note. On the day last named, plaintiffs procured A. Mudge, one of the members of the firm of A. Mudge & Co., to confess a judgment of \$638.50, in vacation, against said firm, in favor of the plaintiffs, upon a sworn statement of facts of the transaction out of which the indebtedness arose. This confession of said judgment was duly entered of record by the clerk of the court, and subsequently approved by the District Court.

In March, 1859, the plaintiffs commenced this suit on the same note against the defendants. They plead, in bar to a second recovery on said note, the foregoing judgment; that it was confessed on the same note, and on no other cause of action; that said judgment is still in full force and effect, unreversed or uncanceled.

The plaintiffs reply, that said judgment is void; that A. Mudge had no authority to confess it; that said confession purports to be upon an account, and not upon the note; that it is materially defective, and under it the clerk had no authority to enter judgment against defendant, &c.

The cause was tried by the court; on hearing, the plaintiffs introduced in evidence the note sued upon, and rested. The defendants offered in evidence the confession of judgment above described, together with the oral testimony of A. Mudge, of the firm of A. Mudge & Co., who testified that at the request of one Driver, agent of the plaintiffs, he gave and executed the confession of judgment alluded to, that the confession was for the balance due on the identical note now sued upon, that said note had been originally given for the price of certain goods, wares and merchandise, purchased by the firm of A. Mudge & Co., of the plaintiffs; that it was present at the time, and constituted the foundation of the confession.

S. W. Summers was also introduced by the defendants, as a witness, who testified that the note sued on was for some time in his custody, that he subsequently gave the note up to one Driver, the agent of the plaintiffs, who afterwards stated to him that a judgment had been confessed by A. Mudge & Co., on the same note, but expressed some dissatisfaction with said confession. This was the substance of the testimony offered by the defendants, which the court ruled out as inadmissible, holding that the said judgment by confession was void, and constituted no bar to plaintiffs right to recover in this action.

The exclusion of this testimony was made the ground of exception, and appeal to this court. The correctness of this ruling is not apparent to us, nor are the reasons for it disclosed in the bill of exceptions.

The sworn statement of facts out of which the indebtedness arose, with the *cognovit* upon which the judgment was entered, seem to be substantially sufficient under the decision we made in the case of *Vanfleet v. Phillips*, 11 Iowa, 559.

That it is void as against the defendant Baldwin, we have held in the case of *Christy v. Sherman et al.*, 10 Iowa, 535. In the same case we held, however, that the judgment was good and binding on the party or partner confessing the same. We will now refer to other authorities, not only to show that such judgment is not void against the party confessing, but that the contract debt, upon which such confession was made, is merged in the judgment so that it cannot become the subject of another cause of action.

The general doctrine is, that if a demand of an inferior degree is changed into one of a higher character, the former is merged in the latter, upon which the party must alone rely. Thus the merger of a simple contract debt in a judgment, or debt of record, is made a familiar example in the books. We will refer to a few of the many adjudi-

cated cases, to show the incorrectness of the ruling below in this case.

In *Sloo v. Lee*, 18 Ohio, 279, it was held that a judgment against one of two partners, upon a joint promise, is a bar to a subsequent suit against both of the partners.

In *Robertson v. Smith et al.*, 18 Johnson, 428, a firm, consisting of four persons, made two notes in their partnership name. A judgment was recovered on the notes against the two ostensible partners. The judgment not being paid, a second suit was brought on the notes against the four partners, one of whom only being served with process, and who was not in the first, pleaded in bar the recovery against the two, and it was sustained.

In *Smith v. Black*, 9 Serg. & Rawle, 142, a judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. A similar decision was made in *Moole v. Hollis*, 11 Gill & John., 11.

In 2 Gilman, 855, it was held that a judgment against one member of a firm for a debt due from the firm constitutes a bar to a recovery against the other members. The same general principle, or rule of practice, is laid down in the following cases: *Robertson v. Smith*, 18 John., 459; *Wood v. Johnson & Thomas*, 18 Mass., 148; *Thornton v. Thompson*, 15 Ill., 416; *Taylor v. Claypool*, 5 Blackf., 537; *King and another v. Hoff*, 13 Meeson & Welsby, 474; *Tropton v. The United States*, 8 Story C. C. R., 646. 2/

We have but little hesitation in concluding that the court below erred in ruling out the defendants' evidence, and the judgment will, therefore, be reversed, and the cause remanded.

Reversed.

Formholz v. Taylor.

FORMHOLZ V. TAYLOR *et al.*

1. PLEADINGS: SPECIAL AND COMMON COUNTS. A party cannot recover on the *quantum meruit* under a count setting up a special contract; but such recovery may be had under a pleading setting up both a special and a common count.

Appeal from Johnston District Court.

THURSDAY, JUNE 26.

UPON the 29th day of September, 1857, the parties defendant to this suit entered into an agreement with the plaintiff, in writing, as follows:

"Fourteen days after date, I agree to deliver unto O. D. Taylor and Nelson Libby, thirteen thimble-skeined two-horse wagons, also one one-horse wagon, and a one-horse top buggy, complete, for which said Taylor and Libby agree to give a bond for a deed of lot No. 5, in block 42, with a building thereon, in the city of Florence, Nebraska, also, the sum of six hundred and seventy-six dollars.

"O. D. TAYLOR.

"N. LIBBY."

Indorsed on the back thereof, as follows: "Received on the within the sum of three hundred dollars.

"WILLIAM FORMHOLZ.

"OTTAWA, September 29, 1857."

The plaintiff alleges in his petition, that, in pursuance of the terms of this agreement, he delivered, in good order, to defendants, the full number of the two-horse wagons, as well as the one-horse wagon and buggy. It appears, further, from the pleadings and evidence, that there was yet due from the defendants upon the said lot, as part of the purchase money near the sum of six hundred dollars; that this amount had

to be paid about the first of November, after the date of the above agreement; that time was made the essence of the contract, and that if defendants should fail to pay the purchase-money when due, that they would forfeit their right to a deed for said lot, and wholly lose the amount of the money paid.

The plaintiff claims that he is entitled to recover for the value of the wagons, &c., as the defendants have failed to assign said bond, or pay the balance of the money as stated in the written agreement, &c.

The defendants answer and aver that the plaintiff failed to deliver said wagons, &c., within the time agreed upon. That when they were delivered, they proved to be of a poorer quality than contracted for, that in consequence of the delay upon the part of plaintiff, the time was about expiring at which the balance of the purchase money had to be paid on said lot, that the defendants were compelled to pay off the same, and that they took the title in their own names. That plaintiff has failed to pay back the money thus advanced, and that the plaintiff having failed thus to fulfill his part of the contract, he is not entitled to recover.

The plaintiff amended his original petition, setting up an additional oral contract with defendants, by which he was to deliver to defendants three additional two-horse wagons, in consideration of which defendants were to pay off the amount due on the bond when it matured, and also obtain for plaintiff a title to said lot. This agreement the defendants deny, and aver that the three wagons were left with them for sale, that they proved to be very inferior in quality, and that out of the whole of the wagons delivered, they had not received money enough to pay back the amount advanced to plaintiff, and the pay for the lot. Trial, and verdict for plaintiff, for \$990. Defendants appeal.

Edmonds & Ransom and *Clarke & Davis* for the appellant, in support of the proposition passed upon in the opinion of the court, cited 3 Phil. Ev. (new Ed.), 399; *Bush v. Chapman*, 2 G. Greene, 549.

Clark & Bro. for the appellee.

BALDWIN, C. J. — There is one controlling fact in this case, that leads us to disfavor the somewhat technical objections of defendants to the ruling of the court, in refusing certain instructions asked, and in overruling the motion for a new trial. That is, the defendants received under their contract, in 1857, the sixteen two-horse, and the one one-horse wagon, and the buggy, property, according to the value placed thereon by plaintiffs witnesses, worth the sum of \$1,460, and that could not at the time of delivery, according to the testimony of defendants' witnesses, have been worth less than the sum of \$1,050, and for which the plaintiff has to this day received but the sum of \$300.

One position assumed by the defendants is, that the plaintiff, having declared specially upon the written contract, he cannot recover upon the additional count for the value of the property delivered, after it had been made to appear that he had failed to comply with the terms of the special contract. The giving and refusing certain instructions by the court unfavorable to this position of defendants, is assigned as error.

The counsel rely upon the ruling of this court, or rather the authorities cited by counsel in their briefs, as reported in the case of *Eyser v. Weisgerber*, 2 Iowa, 467, as tending to show the incorrectness of this ruling of the court.

The court there held that when a party declares specially he must succeed upon his special case, and cannot recover as upon the common counts; that where a party would recover for the reasonable value of services rendered or

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material furnished, upon a special contract, he must either declare in general assumpsit, or unite the common with the special counts. It was for this reason, alone, that the plaintiff had declared specially, and not upon both the special as well as the common counts, that the court held that the plaintiff could not recover on the *quantum meruit*. In other words, we understand the court, indirectly at least, to sustain the rule as adopted in *Britton v. Turner*, 6 N. H., 481. If not, however, clearly recognized in this case, it is without doubt in the case of *Pixler v. Nichols*, 8 Iowa, 106. The plaintiff in this case declares specially upon the contract, and also as upon the common count, for goods sold and delivered, and upon the authority of the above rulings of this court he could recover upon the common count, on the *quantum meruit*. We however think that the instructions asked by defendant were inapplicable, for the reason that the plaintiff relied upon his special contracts, and the question was one for the jury whether or not the additional oral contract was made, and if so, whether it was not substantially complied with by plaintiff.

The very fact that the defendants paid the amount due on the bond is strong evidence, to our minds, that the oral contract, as alleged, was made. If it had not been made, the defendants could have complied with their part of the original contract by an assignment and tender of the bond to plaintiff. And if the plaintiff permitted it to be forfeited, it was his loss, not defendants'.

We do not propose to follow further the points assumed by the counsel of appellant. We think the charge of the court fully and clearly presents the law as applicable to the case, to the jury. We see nothing from the whole of the evidence that would justify us in disturbing the verdict, even if it was for a much larger amount. There is some evidence tending to show that the wagons were not, in every respect, finished, and of the best quality, but the defendants

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accepted of them at the time of their delivery, without complaint. The jury, however, must have made as large deductions for the failure of the plaintiff to comply with the conditions of the contract, both as to the time of delivery, and the character of the work, as the evidence would justify.

Affirmed.

McSHANE V. GRAY *et al.*

1. **REFEREE: ACQUIESCENCE.** The report of a referee should not be set aside on the ground that the reference was to but one person when it should have been to three, if it appears that no objection to such reference was made at the time, and that the party complaining appeared before the referee and submitted the cause on his part.
2. **REFEREE'S REPORT.** It is competent for the court to require a referee to state the facts found as the predicate for the final judgment; but in the absence of such requirement a general finding will be sufficient.

Appeal from Blackhawk District Court.

THURSDAY, JUNE 26.

ON the 25th of April, 1860, this cause, without objection from either party, as far as disclosed by the record, was referred to a single referee, to report "upon the account between the parties." It seems that plaintiff filed a paper, after this, objecting to any action by the referee. Whether this was filed with that officer, or with whom, does not appear. The report states that the parties were all present, that the cause was called, witnesses were examined, &c. To this proceeding thus far, defendants interposed no objection.

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The referee found in favor of plaintiff, and, in the District Court, defendants moved to set aside the report, because : 1st. The reference was made to one person, without their consent. 2. They were not permitted to select, or consulted in his appointment. 3. The facts were not reported. 4. The finding was contrary to law. 5. The referee erred in rejecting the defendants' set-off. This motion was overruled, and from the judgment on the finding, defendants appeal.

Bagg & Allen for the appellant.

Brainard & McClure for the appellee.

WRIGHT, J. — It was competent, by consent of parties, to refer the action to one referee, instead of three. (Code, § 1594.) And when such reference has been made, and the party afterwards raising the objection, failed to signify the same at the time, but, on the contrary, appeared before the referee, and submitted his cause, his mere suggestion, by motion, that the submission was irregular and unauthorized, should not be received with favor, nor entertained.

It was competent for the court to require the referee to state the facts found, as the predicate for the final judgment. This was substantially done in this case. But if not, as there was no requirement to this effect, the report would still be valid. The referee may, in the absence of instructions, state a general finding of so much for one party or the other, and upon this the court can render judgment.

In what respect the finding of the referee was contrary to law, or why defendant's set-off was improperly rejected, is not suggested, and the judgment must stand

Affirmed.

Oswold v. Buckholz.

OSWOLD V. BUCKHOLZ.

1. **MECHANIC'S LIEN.** The purchaser of property on leased premises sold to enforce a mechanic's lien against the lessee, acquires no greater rights than the lessee himself; and when such property can, by the contract of lease, be removed by the lessee only upon the performance of certain conditions, the removal before such performance, by a purchaser, will be enjoined.

Appeal from Dubuque District Court.

SATURDAY, JUNE 28:

THE facts are stated in the opinion of the court.

J. M. Griffith and *W. J. Knight* for the appellant.

No appearance for the appellee.

LOWE, J. — On the 23d day of March, 1857, the plaintiff demised, by a written lease, which was duly recorded, certain premises in the city of Dubuque, to one Schmitz, who was to hold the same for a term of seven years, and pay all taxes, and an annual rent of \$150, payable quarterly, in advance, a failure to do which, on the part of the lessee, was to work a forfeiture of all his rights under the lease. It was further stipulated in the lease, "that all improvements made upon the lot during the term thereof, by said lessee, may be moved and taken off by him at the expiration of this lease, provided that all the rents and taxes, and all assessments shall have been fully paid, and all the other conditions of this lease shall have been fully complied with."

Under this lease, Schmitz took possession of the demised premises, and two years thereafter, while he was indebted for rent in arrear, he employed the defendant, Buckholz, to erect thereon a frame building, which rested upon posts driven into the earth.

Buckholz afterwards brought his special action against Schmitz, to enforce his mechanic's lien, and to recover the price and value of his work, and accordingly obtained a judgment for \$188.85, and had his mechanic's lien established on the demised premises aforesaid.

On the 10th day of September, 1859, the defendant, Buckholz, had sold on execution issued upon said judgment, the frame house aforesaid, which he had built for Schmitz, and purchased it in himself at \$210, and proceeded to remove the house from the premises, to restrain which the plaintiff commenced this proceeding, by injunction. Upon hearing, the court made the same perpetual, and the defendant appeals.

As the plaintiff was not a party to the special proceedings establishing the mechanic's lien, his rights, of course, stand unaffected thereby. The evidence shows, that at the time that defendant was attempting to move off this house, Schmitz was in arrear for rent, that defendant had been informed in relation to the lease, and its terms, that under the covenants of the lease, Schmitz himself could not have removed the house until the expiration thereof, and not even then, till he had fully complied with all the conditions of his lease, in the payment of the rent, and all other dues properly chargeable to him under the same. We suppose the defendant, in his purchase, succeeded to no greater interest in, or higher rights to, the property in question, than Schmitz possessed.

The judgment below is

Affirmed.

Shaw v. Brown.

SHAW V. BROWN.

CONSTRUCTION OF A CONTRACT. A bond for the sale of real estate contained the following conditions: "The said S. (the obligee) paying promptly, time being the essence of the contract, his two certain promissory notes, of even date with this contract, the one in the sum of \$916.66, due on the 1st of January next, with ten per cent interest, and the other in the sum of \$1,833.32, due in six months from date, with ten per cent interest. If said notes are not paid promptly when due, I hereby reserve to myself the privilege of taking possession of said premises and declaring this contract void, and all payments thereon forfeited, and it is understood the said S. is to pay all taxes that may accrue on said land, then this bond is to be carried into full effect. It is also understood that I am to deed said land to the said S, in such parcels as he may sell and wish to convey prior to the payment of the last note, provided said S. pays *pro rata* with the amount deeded."—*Held*:

1. If S., after the first payment as stipulated, should effect a sale and wish to convey a portion of the land, B. (the obligor) would be bound to convey the portion so sold, provided it did not exceed *pro rata* the sum paid.

2. That if within a reasonable time after notice of such a sale and demand for a conveyance, the obligor failed to execute the same, the obligee would be absolved from a further performance of the contract on his part.

3. That if the obligee should make the first payment and should not sell any portion of the land before the maturity of the last note, and made a default in the payment thereof, time being the essence of the contract, he would forfeit the sum paid.

4. Upon the payment of the first note, the obligee was entitled to a conveyance of a *pro rata* portion of the land when he made sale of the same.

2. INSTRUCTION. An instruction not warranted by the evidence should be refused.

3. EVIDENCE: INABILITY TO CONVEY. In an action for damages sustained by reason of a breach of contract to convey lands, a deed showing that the title was not in defendant, at the time the conveyance should have been made, is admissible when tending to sustain an allegation in the pleading upon which issue is joined.

Appeal from Polk District Court.

SATURDAY, JUNE 28.

On the second day of October, 1856, the defendant, Brown, agreed to sell to the plaintiff one thousand acres of land, situated in Guthrie county of this State, "On condition of said Shaw paying promptly, time being the essence of the contract, his two certain promissory notes, of even date with the contract, the one in the sum of \$916.66, due on the first day of January next, with ten per cent interest, and the other in the sum of \$1,833.32, due in six months from date, with ten per cent interest. If said notes are not paid promptly when due, I hereby reserve to myself the privilege of taking possession of said premises, and declaring this contract void, and all payments thereon forfeited, and it is understood that the said Shaw is to pay all taxes that may accrue on said land, then this bond to be carried into full effect. It is also understood that I am to deed said land to said Shaw in such parcels as he may sell and wish to convey, prior to the payment of the last note, provided that said Shaw pays *pro rata* with the amount deeded."

Under this contract Shaw claims to have made the first payment, of \$916.66, with interest, at the time specified therein. That prior to the time for the payment of the last note, he effected a sale of some 333½ acres of said land, desired to convey the same to the purchaser, and accordingly demanded a deed for the same. Being refused, he instituted this action to recover damages for the non-conveyance thereof, and having obtained a judgment for \$1,176.81, the defendant appealed.

E. J. Ingersoll, S. V. White and T. E. Brown for the appellant.

M. D. & W. H. McHenry and C. C. Cole for the appellee.

I. A deed duly executed and acknowledged is *prima facie* evidence that it was delivered on the day of its date. 2 Greenl. Ev., § 297; 1 Phil. Ev., ch. 9, § 1, pp. 467-8; 3 Cow. & Hill's Notes to same, 1281; Shep. Touch., 72; *Breckinridge v. Todd, &c.*, 3 Monr., 54, 55.

II. When a party to a contract by his own act places it out of his power to perform it, he thereby excuses the other party from performance or offer to perform, and becomes liable at once to an action. Story on Cont., § 976; *Clark v. Crandall*, 3 Barb. S. C. R., 612; *Collins v. Vandever*, 1 Iowa, 573; 2 Pars. Cont., 191, and note.

III. That in the construction of the contract the court will take a view of the whole contract, and follow the intent of the parties, and if there is a doubtful or ambiguous meaning to the words, "prior to the payment of the last note," they will be construed most strongly against the obligor, (the defendant,) and especially is the latter true when a different construction involves a forfeiture. Story Cont., §§ 662, 663; 2 Story's Eq. Jur., § 1819; *Marvin v. Stone*, 2 Cow., 781; *Archibald v. Thomas*, 3 Id., 284.

LOWE, J.—The defendant comes into this court upon thirty-seven assignments of error. In his very able printed argument, however, a very large proportion of these have received no notice or attention whatever, and we may presume, therefore, that they are waived, as we think they could be, without compromising the defendant's rights.

Imitating the example set us by the learned counsel for the defense, we will consider the same points elaborated by them. The most important of these relate to the construction of the contract. We have already set forth the important covenants in this contract. The construction which the court below gave to its terms was substantially this,

that if Shaw, after making his first payment as stipulated, should effect a sale, and wish to convey a portion of land, that then, in such contingency, Brown was bound to convey the amount so sold, provided it did not exceed *pro rata* the sum paid; and if Brown failed, after notice and demand, to do so in a reasonable time, Shaw would be absolved from further performance of the contract on his part. On the other hand, if Shaw should promptly make the first payment, and should have no opportunity to sell, and did not sell any portion of the land before the last note fell due, and made default in making the last payment, then, time being the essence of the contract, he would forfeit the same, and forfeit the money which he had paid.

It is insisted that this construction of the contract is unsound, and does not reflect the true intent of the parties. We hold differently. In our judgment, it does give the true meaning and sense of the contract, and is in agreement with the natural import of the words employed, which, after all, is the safest criterion in arriving at the intention of the parties. By adopting this interpretation, greater certainty is secured in the payment of the purchase-money at the time specified, by affording the purchaser increased facilities or means for raising the same, an object of as much importance to the vendor as to the vendee.

The interpretation contended for by the defense is variously stated in their instructions which the court refused, marked by Nos. 18 to 23, inclusive, and which, when divested of its multiform phraseology, means this: that the first payment, if made, was to be regarded in the light of a penalty or security to be held by the defendant for the more prompt payment of the last note, and in the event of a defalcation, to be forfeited; that the stipulation to convey to Shaw certain parcels of land which he might sell and wish to transfer by deed, has reference only to *pro rata* payments which he, Shaw, might make on the last note

prior to its maturity, and has no application to the first note. This interpretation of the contract is presented argumentatively under various aspects and views, the logic of which we are not able to accept.

If such was the intention of the parties they have been singularly unhappy in the use of language to express their meaning. See the case of *McCraney, Exr., v. Griffin et al.*

Again, much emphasis is laid upon the refusal of the court to give to the jury the fourteenth and sixteenth instructions asked by the defense.

The first of these is as follows: "That if the jury find from the evidence that the plaintiff was advised that the defendant could forfeit his title to said land prior to the time specified in the bond, and that the plaintiff made the declaration to the defendants that he should not pay the said last note, and could not perform the said bond, on his part, with the understanding that said declarations would influence the action of the defendant, and induce him not to perfect the title to said lands in himself, and that the defendant did rely on such declaration, and by reason thereof did not perfect the title to said lands in himself, and be in readiness to convey said lands as provided in the bond, then the plaintiff cannot recover, on the ground that the defendant did not have the title to said lands named in said bond for the execution of said deed."

We take it that the object of this instruction was to show to the jury that the defendant had a valid excuse for not possessing himself of the title to the lands in question, if the jury should find the existence of certain facts named therein, under the evidence.

The instruction overlooks the important fact that previous to all this the plaintiff had been absolved from performing any further his covenants in the bond, because the defendant, acting upon his own construction of the contract, had refused, on demand, to make to the plaintiff a deed to cer-

tain parcels of land, in proportion to the amount already paid. The plaintiff, therefore, had a right to say, as he did say, a few days before the last payment fell due, that he did not expect to pay, and could not and would not pay the last note. For, up to this time, the plaintiff had made no default in the performance of his contract, but the defendant had, and we do not know but what his failure in this respect was the cause of the plaintiff's inability to pay the last note. We are certainly at fault in perceiving how the above instruction could, with any legal propriety, have been given to the jury.

The same objection lies against instruction number sixteen, with the additional objection that it is based upon a set of supposed facts, some of which are wholly unwarranted by the evidence in the case. We do not deem it important to incorporate it in this opinion, and point out, in detail, its faults as an instruction. The proposition of law which it contains may be true, yet, in the absence of testimony to sustain the special understanding or contract set up therein, by which a forfeiture of the contract was agreed upon, and the defendant released from all liability, by reason of his failure to deed, &c., it could not, as we have often held, be submitted to the jury.

There is only one other error which counsel in argument have particularly pressed upon our notice, and that relates to the introduction, at the trial, of some evidence offered by the plaintiff to establish, or as tending to establish, one of the issues on his side. He had, among other things, alleged in his petition, "that prior to the time fixed for the conveyance of said land by defendant to plaintiff, the defendant, by his own wrongful act, placed it out of his power to convey said land, or any part thereof, to plaintiff, according to his said bond." This allegation was denied. The plaintiff offered a deed of conveyance from James Buel and wife to D. P. W. Day, purporting to be dated

and acknowledged on the 1st day of April, 1857. This deed conveyed the southwest quarter of sec. 14, T. 78, R. 32, west, being one of the tracts of land which the defendant had stipulated in his bond to convey to plaintiff, on the 2d day of April, 1857; against the objection of the defendant, it was permitted by the court to go to the jury as evidence. Its sufficiency to establish the allegation aforesaid without more, might well be insisted upon; its incompetency, as tending to maintain the plaintiff's side of the issue, is not apparent to us. It is true, that it afterwards turned out in the evidence, that Buel and wife resided in the state of New York, that the deed was transmitted to Iowa with the name of the grantee in blank, which was not filled up for some two or three weeks after the deed was sent to this state. This fact alone affords no sufficient reason why the deed should have been excluded, for we suppose that if the deed was in all other respects honest and regular in its execution, the title under it would be deemed to have passed at its date.

One object in introducing this deed, we presume, was to show that the title of the land therein described was out of the defendant. If it tends to do this, although inconclusive, it is not, on that account, incompetent. Accompanied with other testimony, it might constitute an important link in the chain of evidence to establish that proposition.

Counsel, in argument, claim that the introduction of this deed must have had the effect to mislead the jury. Under the peculiar aspect of this case, we cannot comprehend how this can be.

The defendant, in his special answer, and also in his testimony, admits that he had not the title to these lands at the time the plaintiff's last note fell due, and excuses himself for not having obtained the title, upon the ground that plaintiff had failed to make his payments according to the covenants in his contract, claiming that he himself had

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purchased the same lands on what were termed time bonds, in the manner that he had sold to the plaintiff, and that he did not perfect the title in himself, because the plaintiff had given him to understand that he should not make the last payment under his contract.

However valid this excuse might be, under some circumstances, it was inadmissible in this case, for the reason that he had released the plaintiff from making the last payment on said purchase, by failing to perform a precedent obligation, which was, to convey, on demand, before the last payment, certain parcels of land, in proportion to the amount already paid. And this really was the pivotal point in this case, and it was a matter of scarcely any moment whatever, whether said deed was admitted or excluded as evidence.

This comprehends, as we understand it, all the points made in argument of counsel, and as to the other matters and things set down as error, we are quite prepared to overrule each and all of them, and to affirm this case.

Affirmed.

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104	408

WURTZ, AUSTIN & McVEIGH v. HART *et al*

1. **PLEA IN BAR.** An action pending in the District Court of the United States, brought by creditors of an assignor, to set aside an assignment made for the benefit of creditors, is not necessarily a bar to a proceeding in a State Court to enjoin the assignee from paying dividends under such assignment.
2. **RIGHTS OF SECURED CREDITORS UNDER AN ASSIGNMENT:** A creditor under a general assignment, who has special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the

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amount remaining unpaid, after exhausting the property upon which he takes a special lien.

3. REMEDY IN EQUITY: STATUTE CONSTRUED. Section 1832, chapter 77 of the Revision of 1860, provides a method for excepting to the genuineness or correctness of a claim or demand, but does not afford any plain, speedy and adequate remedy, whereby creditors holding securities may be compelled to exhaust them before taking dividends under the assignment.

Appeal from Johnson District Court.

SATURDAY, JUNE 28.

IN EQUITY. The bill charges that Gower & Son, on the 20th of June, 1860, pretended to make a general assignment of all their property to Anson Hart, for the benefit of their creditors; that Hart accepted the trust, and is proceeding to execute the same; that, at the time of such assignment, petitioners were creditors of said Gower & Son, and have filed their claims with said assignee, within the time, and in the manner prescribed by the statutes of this State; that said Gower & Son had at the time, other property not passed to the assignee, but the same had been so incumbered and secreted, that the only security for the debts of petitioners, is what they may be able to derive from the assigned property, or by proceedings in equity, and that the proceeds of said assignment will not pay more than thirty cents on the dollar of the indebtedness.

It is further represented, that W. W. Kendrick & Co., and other creditors named, about the time of said assignment, or since or before, received from said Gower & Son securities, or payment for their claims in lands conveyed or mortgaged, or other property; that, notwithstanding this, the said creditors combining and confederating with said Gower & Son, to defraud petitioners, have filed with said assignee, their respective claims, without any payments acknowledged thereon, and insist that they are entitled to

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receive the same dividend as petitioners, on the full amount of their demands; that such payment would be inequitable and unjust; that said assignee is about to pay said creditors, as well as petitioners, a dividend under said assignment, without making any deduction or allowance for the payments and securities aforesaid, and that he will make such payment unless restrained.

It is further shown that petitioners cannot state precisely what securities or payments have been received by said respondents, (creditors,) but are informed that large amounts have been so received.

Complainants also state that they have filed in the District Court of the United States, for the district of Iowa, their bill against said assignee and others, to set aside said assignment, upon the ground that it is fraudulent and void, and made to hinder, delay and defraud them, and other creditors of said Gower & Son; that they do not intend or propose to receive any dividends under said assignment, until said proceedings are determined; that, notwithstanding the pendency of said proceedings, the assignee is about to declare dividends, and make payments to said respondents, (creditors,) upon their claims so paid or secured in part or in whole.

The prayer is that the said creditors, the assignors, and assignee, may be made parties; that said creditors may disclose what payments or securities they have received; that they may be compelled to indorse on their claims all payments made; that they shall be required to exhaust any securities they may have before participating in the benefits of said assignment, or assign the same to the assignee, for the benefit of all the creditors; that the assignee be restrained from paying over to such creditors, and they from receiving any dividends, until the proper payments are deducted, or such securities transferred; and for general relief.

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Kendrick & Co., and other creditors, moved to dissolve the injunction, substantially, because the bill was void of all equity. This motion, and a demurrer for the same cause were sustained, and complainants appeal.

Grant and Edmonds & Ransom for the appellant.

Clarke & Davis for the appellee.

WRIGHT, J. — We find no arguments in the cause, and are left to infer the positions assumed by respondents, from the causes set forth in the motion and demurrer.

It is there assigned that the petition shows another action pending in the United States District Court, and that petitioners are not entitled to this action at the same time. The pendency of such other action, however, is by no means a necessary bar to this. It is not suggested that an injunction was granted in that case to restrain the assignee from paying money received by him, from time to time, to the creditors, nor that the respondents (creditors) are parties to that bill. Not only so, but if an injunction had been asked and granted in that case, the assignee should be restrained, if, in defiance of that order, he treats the assignment as valid, and is about to pay a dividend upon the debts. But one further view upon this question will be seen, in the consideration of the other point relied upon by respondents, to wit: That complainants have a complete statutory remedy for the matters complained of by way of exceptions, as provided under ch. 77 of Revision.

This is a contest between the creditors. If Kendrick & Co. and those united with them were *paid* by Gower & Son any portion of their demands, and have failed to make the proper credits, insisting upon the full amount of their claims, then, we are of the opinion, that under § 1832, of said ch. 77, complainants could except to the same, as shown by the assignee's report, and have their correctness

adjudicated. If, on the other hand, they have securities which they have failed to exhaust, then there is no plain, speedy and adequate remedy given to complainants by the statute, to compel them to resort to such securities before taking dividends under the assignment. A creditor under a general assignment, who has a special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid, after exhausting the property upon which he has such special lien. Or this same rule may be stated thus, that if a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien. (*Dickson et al. v. Chorn et al.*, 6 Iowa 19.) And this is one and the main object of the present bill. The statute, in giving a party the right to except to any claim or demand of a creditor exhibited, and authorizing the District Court to hear the allegations of the parties in the premises, and to render judgment thereon, has reference more particularly to contests over the correctness or genuineness of such claims. Here, however, according to one part of this bill, or one view of it, complainants do not deny that respondents are entitled to the full amount of their claims, but say that they should be first paid out of their special fund or security. If they excepted to the report they could accomplish nothing, for they could not disprove the right of respondents to recover. Their right to recover would be undisputed. And it was never intended by the statute that all the various rights and equities of creditors should be settled exclusively and only in the manner there pointed out.

In our opinion, the decree below should be

Reversed.

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA;
DES MOINES, DECEMBER TERM, A. D. 1862.

IN THE SEVENTEENTH YEAR OF THE STATE.

PRESENT:

HON. CALEB BALDWIN, CHIEF JUSTICE.
" GEORGE G. WRIGHT, } JUDGES.
" RALPH P. LOWE, }

McLENAN et al. v. SULLIVAN et al.

1. **RESULTING TRUST.** When land is purchased by one party with money furnished by another, an implied or resulting trust arises, the purchaser becoming a trustee.
2. **CASE RE-AFFIRMED.** *Sullivan v. McLenan*, 2 Iowa, 437, re-affirmed.
3. **STATUTE OF LIMITATION.** When the legal title to real estate has been obtained by fraud, an action to recover by the actual or equitable owner may be commenced at any time within five years after the discovery of the fraud. Code of 1851, §§ 1659, (clause 3,) and 1660.

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Appeal from Dubuque City Court.

FRIDAY, OCTOBER 10.

THE facts are fully stated in the opinion of the court.

Wiltse & Blatchley, and *Smith, McKinlay & Poor*, for the appellants, as to the statute of limitations, cited *Bowman v. Wathan*, 1 How., 189; Ang. Lim., 190; *Gould v. Gould*, 3 Story C. C. R., 539; *Ferson v. Sanger*, 1 Wood. & Min. C. C. R., 138; as to the assignment of a right of action for a fraud, *Brace v. Reed*, 3 G. Greene, 422.

Samuels, Allison & Crane and *O'Neil and McLenan*, for the appellees, as to the statute of limitations, cited Rev. of 1860, § 2741; 2 Story Eq. Jur., § 1521; *Ferris v. Henderson*, 12 Penn. St., 49; *Raymond v. Simondson*, 4 Blackf., 49.

LOWE, J. — In the spring of 1847 the Federal Government sold at public outcry the mineral lands lying around the city of Dubuque. These lands were previously possessed by a large number of occupants, whose claims were of different and irregular sizes, not corresponding with the lines of the government surveys. These occupants formed a claim association, under a constitution and a written agreement, which they respectively signed, including the parties to this suit. The object of this association and agreement was to settle by arbitration prior to the public sales, the rights to disputed claims, and to protect each real and bona fide owner in the purchase of his claim, as thus ascertained, settled and designated, on a plat of the lands made for that purpose. To carry out more certainly and conveniently this purpose, public bidders were appointed to attend the government sales, and bid off the lands, and reconvey to the several owners their appropriate quantity, or according to their respective interests.

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Lot 173, the particular tract now in controversy, was a contested claim prior to the public sales, and the rights of ownership were duly adjusted as in other controverted claims, and it was found, and so decided, that the plaintiffs were the lawful claimants of one undivided half of said tract, the defendant Sullivan and one Levans an undivided one-fourth each, and it was so marked upon the plat above described. This lot was situated in and formed a fractional part of several sections. All except so much as was situated outside of the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 23 was bid off in the name of George L. Nightingale, for the benefit of the claimants.

At this time the plaintiffs were non-resident minors, living in Cincinnati, Ohio. Their father, Bernard McLenan, who had made or purchased the claim, had died sometime before the land sales. Just prior to the sale, however, their elder brother, John McLenan, had gone to Dubuque, from Ohio, and attended to the establishment of the claim before the requisite arbitrating committee, and paid all necessary charges and expenses therefor.

During the same visit, at the urgent request of Sullivan, he, the said John, loaned him some \$440, on terms much less than the value of money at that time, but under a special contract that in consideration of this favor, he, the said Sullivan, would look after and protect the claim that had been awarded to the heirs of Bernard McLenan, deceased, and that he would advance for said heirs at the sales whatever sum of money should be necessary to pay the government for their land, the amount to be subsequently credited, however, upon the loan.

This was the condition of things at the date of the sales of these mineral lands, when George L. Nightingale bid off so much of lot 173 as laid outside of the W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 23, and took the certificate of purchase in his own name, in trust and for the use of the real claimants.

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The money to pay for the same was advanced, but by whom the said Nightingale could not recollect. Yet we are satisfied from all the evidence submitted in the case, that the money was advanced for the McLenans, in all probability by Sullivan, under the special contract above specified. A short time subsequently to this, the heirs of McLenan being non-residents, Sullivan set up a claim to all the land in controversy, except the one-fourth claimed by Levans, and demanded a deed of the said Nightingale for the same, but he refused to make a deed to the one undivided half, which he stated he knew belonged to the heirs of McLenan. Thereupon Sullivan instituted a suit against the said Nightingale and the heirs aforesaid, to recover a conveyance of said land to him. He afterwards obtained a decree to that effect by default, by dismissing his bill as to the McLenans, and persuading Nightingale not to appear and contest the same. In accordance with the terms of this decree, Nightingale conveyed to Sullivan the equitable interest which the said McLenans had in said land. This was on the 19th day of December, 1847. We have already said that a part of lot 173, in which the parties were interested, was situated in the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 23. This part, in connection with other lands, was bid off, under the arrangements of the claim association, in the name of John G. Shields, for the use of the respective claim owners. The right of the McLenan heirs to an undivided half of this part, being thirteen acres, more or less, was precisely the same, having the same origin and foundation as their right or interest to the other portions of lot 173, bid off by Nightingale. In May, 1854, when Wm. McLenan, one of the plaintiffs in this case, visited Dubuque, to look after the business and interests of himself and co-heirs, he found the said Shields still holding the legal title to a part of their land, that which is herein referred to, in section 23, and procured from him a legal conveyance of the same, or

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a declaration of his trust in favor of said heirs. In October following, Sullivan filed his bill to set aside this conveyance, claiming to have the equitable, and asking to be invested with the legal title. His bill was dismissed in the court below, and on an appeal met with the same fate, so far as the McLenans are concerned, in this court, where the cause was fully considered, both upon the law, and the facts of the case. The substance of that decision was that Sullivan had no interest beyond an undivided fourth in the thirteen acres above described; that Levans had a fourth, and the McLenans a half; that there was a resulting trust from Shields, who had the legal title, to these parties, his *cestui que trust*, following the general rule, that where land is purchased by one, with money furnished by others, an implied or resulting trust arises, and the former becomes a trustee for the latter.

Following this decision, William McLenan and his sister, Margaret Laboyteaux, with her husband Isaac N. Laboyteaux, having purchased out the interest of John McLenan, did, in May, 1859, institute the suit at bar, to recover the legal title, (that it might be united with the equitable, which they claimed to have,) of the undivided half of that part of mineral lot 173, which lies outside of the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 23, and which Michael J. Sullivan, the husband and father of the main defendants in this case, wrongfully possessed himself of, in the suit first above referred to, of himself against Nightingale and the McLenans. The right to do so, and to obtain relief, was virtually decided in the latter of the cases above alluded to, wherein the said Michael J. Sullivan was the plaintiff, and Shields and others the defendants. *Sullivan v. McLenan*, 2 Iowa, 437.

The same questions, both of law and fact, that arise in this case, were fully discussed and determined in that case against the then plaintiff, Sullivan.

We find no reason for changing the opinion we then expressed upon these questions, or for re-discussing the same, at length. Many of the facts which we have stated above, are founded upon and fairly sustained by the evidence in this case, which, with other facts testified to, show, in our judgment, with reasonable conclusiveness, that the plaintiffs were the true equitable owners of the land in dispute, and as such should now be clothed with the legal title.

There are, however, one or two collateral questions insisted upon, as being against the plaintiff's right to the relief prayed for in their petition. One of these is, that the plaintiff's right to recover is barred by the statute of limitations, the suit not having been brought within ten years next after the cause of action arose, as required by the fourth clause of § 1659 of the Code. The third clause, however, of the same section, in connection with § 1660 of the Code, permits relief on the ground of fraud to be granted, within five years after the discovery thereof.

The evidence shows that on the 18th or 20th of May, 1854, the plaintiffs in this suit obtained their first information that Sullivan had procured, under the color of a decree of the court, the legal title from Nightingale of the land in question, and this was within five years of the commencement of this suit. Now let us see what was the good faith of this transaction. Before the land sales by the Government, the respective claim rights of these parties were fully investigated by the tribunal which they themselves had assisted in creating, and the property in question was ascertained and decided to be, by said tribunal, one-half in the plaintiffs, and only one-fourth in the defendant, Sullivan. After this was done, Sullivan recognized the McLenans' right, and entered into a special contract with them that he would, in consideration of a certain favor granted to him, guard and protect their interest in said property.

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Soon after the land sales, and when John McLenan, with whom this contract had been made, had left the state, Sullivan demanded a deed of Nightingale, the trustee, for the McLenan interest. This being refused, (as he was distinctly told by Nightingale, upon the ground that the McLenans were the lawful owners of said interest,) he instituted his suit, both against Nightingale and the McLenans, to recover the legal title to the same. Now, what method did he adopt in order to obtain a decree without bringing before the court the notice of his claim? Simply by dismissing his bill as to the McLenans, and inducing Nightingale not to appear and contest his claim, but to let a decree go by default, agreeing that no costs should be taxed against him. A statement of these facts is sufficient to exhibit the bad faith, and the fraudulent character, of this transaction, and it cannot therefore be said that the plaintiff's right of action was barred by the statutes.

The question as to the admissibility of Wm. McLenan's deposition is an unimportant one, as the case is, in our opinion, with the plaintiffs, without his testimony. Nor did the court err in dismissing the bill as to the administrator, or as to Levans, one of the tenants in common. We shall, therefore, affirm the judgment below.

Affirmed.

DYER v. McHENRY & Co., Garnishees.

1. **TRANSFER AND ASSIGNMENT.** When all the right, title and interest of the payee of an acceptance against a judgment debtor is transferred to a garnishee before service of notice of garnishment, he is entitled to credit for the amount thereof on any debt due from him to the said debtor, though the assignment in writing was not executed until after such notice. *After* when the parties had not completed the negotiation and transfer.

Dyer v McHenry & Co.

Appeal from Dubuque District Court.

FRIDAY, OCTOBER 10.

PLAINTIFF held a judgment against one Lancaster, and on the 13th of March, 1861, garnished defendants, as his debtors. The answer admits a small indebtedness. Plaintiff claims that the indebtedness is larger, and this depends upon the question, whether a certain acceptance against said Lancaster was held by defendants at the time of the garnishment, in such a manner as to constitute a set-off to the amount otherwise admitted to be due and owing. The cause was heard upon the answer of the garnishees, issue thereon, certain testimony and admissions. Judgment for plaintiff, and defendants appeal.

Wiltse & Blatchley for the appellants.

1. The garnishees, in determining the amount of their indebtedness, are entitled to the benefit of any equitable defense which they may have. *Greene v. Nelson*, 12 Met., 573; *Hathaway v. Russell*, 16 Mass., 479; *Allen v. Hull*, 5 Met., 266; *Wakefield v. Martin*, 3 Mass., 448; *Chapman v. Gale*, 32 N. H., 141; *Smith Twoogood & Co. v. Clarke & Henley*, 9 Iowa, 241.

II. The garnishee is entitled to the benefit of contracts made before the garnishment, though not carried into effect until afterwards. 12 N. H., 118.

Wilson, Uiley & Doud for the appellee, contended that the authorities cited in support of the first proposition stated by appellants' counsel, are not applicable, and cited *Drake Attach.*, § 413, and the cases there cited.

WRIGHT, J. — The liability of Lancaster upon the acceptance is not controverted. But the inquiry is, whether the garnishees held it so as to be available to them in this case.

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The draft was drawn by Dimock & Gould on Lancaster, payable to the order of the Cashier of the State Bank, Dubuque Branch. It was accepted by Lancaster, and passed into the hands of the garnishees by indorsement from the cashier, and also the agent of the drawers. Did it thus pass, so as to vest the title legally or equitably in the indorsees, prior to the garnishment?

The appellants claim that if they had actually purchased and paid for this draft before the service of the garnishee process, and were in equity invested with all right and title thereto, they are not liable for the amount due Lancaster, but for such draft, though the written assignment was not made until long after, and just before making their answer. We are inclined to concede the truth of this proposition. The rule, however, cannot avail appellants, unless they held this equity. As a matter of fact, under the testimony, were they such equitable owners? We think not.

They admit their liability, but for this indorsement or acceptance. Their own version of the time of the purchase and circumstances attending it is not clear, nor does it place the facts beyond controversy in their favor. The testimony, aside from the answer, satisfies us that they perhaps were negotiating for it prior to the garnishment, but that this negotiation was not completed; nor did they part with any consideration until afterwards. The judgment is therefore

Affirmed.

Langworthy v. Woodworth & Cummings.

LANGWORTHY V. WOODWORTH & CUMMINGS.

1. DISCHARGE OF JUDGMENT: CONSIDERATION. When a bill praying an injunction to restrain the execution of a judgment against one of several defendants alleged that the complainant, who was one of the defendants, paid to the judgment plaintiff a sum which was larger than his share of the judgment debt and costs, which was accepted in full satisfaction of all claims against the complainant and in consideration of his release and discharge from all demands under and by virtue of said judgment; to which bill the respondents demurred on the ground that the contract of discharge was unsupported by a consideration; it was held that the demurrer was properly overruled.

Appeal from Dubuque District Court.

FRIDAY, OCTOBER 10.

IN EQUITY. The petition states that in May, 1859, one Bronson recovered two several judgments against complainant, The Dubuque, St. Paul and St. Peters Railroad Company, T. E. Bissell and John W. Taylor; that these two judgments were obtained upon two notes made by the Railroad Co., to Bronson, upon one of which complainant was liable as third and the other as fourth indorser; that these judgments amounted to \$461.55; that on the 9th of July, 1859, complainant proposed to pay Bronson \$250, "which was more than equal to plaintiff's share of said judgments and all costs," if he, Bronson, would accept and receive the same in full satisfaction of all claim and obligation against plaintiff by virtue of said judgments, and would in consideration thereof release and discharge complainant from all further demands thereunder; that on the next day this proposition was accepted by Bronson, and he received the \$250 in full satisfaction of complainant's liability on said judgments; that in consideration thereof the said Bronson did then and there release and discharge complainant from said judgments, and all liability thereon, and did then satisfy and cancel the same so far as complain-

Langworthy v. Woodworth & Cummings.

ant was concerned; that whether said release was made a matter of record, he does not know.

It is also averred that Bronson afterwards assigned these judgments to the respondent, Woodworth, but received no consideration therefor; that Woodworth had full knowledge of the payment and satisfaction aforesaid, and of complainant's release and discharge; that notwithstanding all these matters the said Woodworth has procured executions, placed the same in the hands of his co-respondent, Cummings, as sheriff, and is about to have the same levied upon complainant's property, and will so levy the same if not restrained, to his irreparable injury, &c. The prayer is for an injunction, and that said payment and discharge may be entered of record on the proper dockets, so as to show complainant's release, &c.

The injunction was granted. Respondents demurred to the bill, upon the ground, in substance, that the alleged release or discharge was without consideration, and void. Demurrer overruled, and respondents refusing to answer, there was a decree as prayed by the bill. Respondents appeal.

Samuels, Allison & Crane for appellants.

Wilson, Utley & Doud for appellee.

WRIGHT, J.—This case was submitted without argument by either party. We see no reason for disturbing the decree below, and it is therefore

Affirmed.

Loomis, Conger & Co. v. Simpson.

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LOOMIS, CONGER & CO. v. SIMPSON.

1. INSTRUCTIONS. When any part of the charge given by the Court to a jury is correct, a general exception to the whole charge presents no question for examination in the Supreme Court.
2. AGENCY: SUB-AGENT. When the employment of a sub-agent is necessary to the transaction of the business of the principal, if the agent makes a fit and suitable selection he is not responsible to the principal for his acts.
3. DELEGATION OF AUTHORITY. While the authority of a factor or an agent cannot be delegated, a principal may confer the power of delegation or substitution, either expressly or impliedly; or may after delegation by the agent, ratify or confirm the same in such manner as to make the sub-agent responsible directly to the principal; but the fact that the principal knows that a sub-agent or factor will be employed does not relieve the liability of the agent to the principal.

Appeal from the Dubuque City Court.

FRIDAY, OCTOBER 10.

THIS action was brought to recover of defendant a sum of money which plaintiffs allege to be due for goods delivered to be sold on commission, for which he has failed to account. Defendant insists that he was instructed to sell a portion of the goods in Dubuque — to ship the other east and south — that he has accounted for all those sold either in Dubuque or elsewhere, for which he (defendant) has received payment. Trial, and judgment for plaintiffs.

John L. Harvey for the appellant cited, Story Ag., § 201; 1 Pars. Cont., 72; *Foster v. Preston*, 8 Cow., 198; *Moon v. The Guardians of the Poor*, 3 Bing., 812; *Warren Bank v. Suffolk Bank*, 10 Cush., 582; *Dorchester and Milton Bank v. New England Bank*, 1 Id., 177; *Bank of Washington v. Triplett*, 1 Pet., 25; *Fabius v. The Mercantile Bank*, 23 Pick., 330; *Bellenire v. The Bank of the United States*, 4 Whart., 105; *The Mechanics' Bank v. Earp*, 4 Rawle, 384; *Jackson v. The Union Bank*, 6 Har. & John., 146; *Smedes v. The*

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Utica Bank, 20 John., 372; *Hyde et al. v. The Planters' Bank of Mississippi*, 17 La., 560; *Tieman et al. v. The Commercial Bank of Natchez*, 7 How., 648; *East Haddam Bank v. Scoville*, 12 Conn., 303; *Smith's Mercantile Law*, 140.

Cooley, Blatchley & Adams for the appellee.

WRIGHT, J.—The points made arise upon certain instructions, given and refused. The instructions given we need not notice, as "the charge" was excepted to as a whole, and it is not now pretended it is all erroneous. The action was commenced in May, 1861, and upon the authority of *The Davenport Gas Light and Coke Company v. The City of Davenport*, and *Wilhelmi v. Leonard et al.*, ante, this method of excepting presents no question for our examination.

Two instructions were asked and refused, as follows:

1. If the jury believe that Simpson asked plaintiffs whether he should send the goods to Memphis for sale, and they replied that he should do with them as he would with his own, and he thereupon sent them to a factor of good credit, defendant is not liable for the default of such factor.

2. If the employment of a sub-agent was necessary, and that fact was known to plaintiffs, and if defendant selected an agent of capacity and credit, he is not liable for the default of such sub-agent.

If the testimony showed that Morris (the merchant at Memphis) was substituted as the agent or factor of plaintiffs with their consent, express or implied, these instructions were correct, and should have been given. As a rule it is true that where the employment of a sub-agent is necessary, the agent, if he makes a fit and proper selection, is not responsible. And it is equally true as a rule that in the case of a factor or broker, the authority cannot be delegated. (*Cochran v. Islam*, 2 M. & S., 301; *Solly v. Rathbone*, Id.,

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298; *Catlin v. Bell*, 4 Camp., 183; 1 Pars. Cont., 71, 84.) But we suppose that the principal may confer the power of delegation or substitution, and that this may be done in writing, as by the letters conferring the power upon the agent, by words, or by acts, which acts or words may by implication give the authority or ratify the substitution after it is made. It must be remembered, however, that there is a wide difference between the employment of a servant or sub-agent by the factor, and the delegation of authority or a substitution. The factor may act through or by the hand of another, and yet there be no pretense that there has been a substitution in such a sense as to bind the principal. And until the fact of substitution, with the consent and approbation of the principal, is once established, (or his subsequent ratification or confirmation) there can of course be no ground for claiming that his remedy is against the substitute, instead of the original agent.

In this case the instructions refused were predicated upon two facts. These were, that if plaintiffs told defendant "that he should do with the goods as he would with his own," or if "the employment of a sub-agent was necessary, and that fact was known to plaintiffs," then, in either event, defendant had a right to send the goods to a factor of good credit, to whom, and not defendant, plaintiffs should look for their proper disposition. We do not think, however, that if the jury had found both of these facts in favor of defendant, it necessarily followed that he would not be liable for the default of the person so selected. The inquiry still remained was this person selected as the servant of the agent or factor, or did he become the agent of the principal? It by no means follows, where produce, for instance, is intrusted to a commission merchant in Dubuque, and sent forward by him to his correspondent or agent at Chicago or St. Louis, that a privity of contract exists between such correspondent and principal, to the extent that the original factor is released

Downing v. Harmon.

and the sub-agent only is liable. Nor does it make any difference that the principal or consignor knows that it must and will be sent forward to find a market. He has a right to, and is presumed to repose confidence in, the financial ability and business capacity of the person so employed, and if such factor employs other persons, he does so upon his own responsibility; and having greater facilities for informing himself and extending his business relations, upon him, and not upon the principal, should fall the loss of any negligence or default. If, however, another person has been substituted who, with the knowledge and approbation of the principal, takes the place of the original factor, or if such substitution is necessary from the very nature of the business, and this fact is known to the principal, the liability of the substitute may be direct to the principal, depending upon questions of good faith and the like, on the part of the factor in selecting the substitute.

Under the circumstances, we think the instructions were properly refused, and the judgment is, therefore,

Affirmed.

DOWNING V. HARMON.¹

1. CORRECTION OF ERROR. The Supreme Court will not review a ruling granting a default before a notice to set the same aside has been made in and overruled by the court below: following *Pigman v. Denny*, 12 Iowa, 396, and *McKinley v. Bechtel*, 11 Iowa, 561.

¹ The court determined two causes having this title, in this opinion.

Samuels v. The County of Dubuque.

Appeal from the Bremer District Court.

FRIDAY, OCTOBER 10.

John E. Burke for appellants.*Wright & Avery* for appellees.

WRIGHT, J. — These actions were commenced in June, 1861. Defendant appeals, and assigns for error that judgment in each case was entered by default, when the court had no jurisdiction, the return of the officer failing to show due service. The construction given to § 3545, and the reasoning used in the cases of *Pigman v. Denny*, 12 Iowa, 396, and *McKinley v. Bechtel*, 11 Id., 561, compel us to affirm these cases. Appellants' remedy, if any, is by motion in the District Court, and not by appeal, in the first instance, to this.

Affirmed.

SAMUELS V. THE COUNTY OF DUBUQUE.

1. CONSTITUTIONAL LAW: ATTORNEY'S FEES. Section 4168 of the Revision of 1860, which establishes the maximum of attorney's fees for the defense of criminals, under appointment by the court, is not inconsistent with § 18, Art. 1 of the Constitution.

Appeal from Dubuque District Court.

FRIDAY, OCTOBER 10.

THE facts are stated in the opinion of the court.

Samuels, Allison & Crane, for the appellant, cited *Webb v. Bard*, 6 Ind., 17; *Gaston v. The Board of Commissioners*, 3 Id., 497; *Alleghany County v. Watt*, 3 Penn. S. R.,

462; *Walcott v. Walcott*, 9 Verm., 37; *Vermillion County v. Knight*, 1 Scam., 97; *Hall v. Washington County*, 2 G. Greene, 476; dissenting opinion of GREENE, J., in *Whicher v. Cedar County*, 1 Id., 218.

W. T. Barker for the appellee.

LOWE, J. — Plaintiff was appointed by the District Court of Dubuque county, to defend two pauper criminals, one for grand, the other for petit, larceny, for which he charged \$110, and presented his bill for that amount to the board of county supervisors, who allowed him \$25 for said services, which plaintiff declined to accept, and afterwards instituted this suit in the District Court, to recover the said sum of \$110. As the above facts were disclosed, among other things, upon the face of the petition, the defendant demurred :

First. Because the compensation in such cases is the subject of statutory regulation, and the amount fixed by law was allowed by the board of supervisors to the plaintiff.

Second. That the action of said board in the premises cannot be reversed by an original suit in the District Court.

The demurrer was sustained, and the suit dismissed. This ruling is now claimed to be erroneous. The chief, and indeed the only, point made in the argument of counsel for the plaintiff is, that § 4168 of the Revision of 1860, establishing the maximum of fees which an attorney appointed by the court to defend a person indicted for any offense, (on account of such person being unable to procure counsel,) violates the eighteenth section of the first article of the Constitution, which provides "that private property shall not be taken for public use, without just compensation."

The argument is, that professional services rendered in defense of a criminal is property in the sense of the Constitution, and that when such services are reasonably worth

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one or two hundred dollars, the party rendering them, cannot be compelled to accept \$25 for the same; that this last sum under the circumstances, would not be a *just compensation*, in the true meaning of the Constitution. The inconclusiveness of this reasoning is too manifest to require a formal notice. It overlooks the fact, that the compensation, in cases of this kind, must be paid from the county revenue, the collection and disbursement of which are under the general control of the Legislature. It also overlooks the still more important fact, that attorneys are officers of the law, whose fees, duties and responsibilities may legitimately be the subject of legislative regulation, like that of other officers, and inasmuch as a *class*, they enjoy certain special privileges under the law, something is justly expected from the *esprit de corps* of the profession in effectuating the policy of the government, in giving to every pauper offender arraigned for trial, the assistance of learned counsel. We hold, therefore, that there was no error in sustaining the demurrer, and the judgment below will stand

Affirmed.

13	538
78	548

13	538
143	263

DALTER V. LAUE & GUYE.

1. SALE OF INTOXICATING LIQUORS. A sale of intoxicating liquors made in another State for the purpose and with the intent to enable one of the parties to violate the law of this State for the suppression of intemperance is void. It is otherwise when not made for that purpose.
2. DEFENSE AT LAW. A defendant in chancery will not be permitted to set up a defense, which he has neglected to interpose, and which he should have interposed, to an action at law involving the same subject-matter.

Dalter v. Laue & Guye.

Appeal from Dubuque City Court.

FRIDAY, OCTOBER 10.

THE facts are stated in the opinion of the court.

John L. Harvey for the appellant.

I. The transaction was a mortgage, and this may be shown by parol evidence. *Roberts v. McMahon*, 4 G. Greene, 34; *Montgomery v. Chadwick*, 7 Iowa, 114.

II. A judgment at law is no bar to a suit in equity when the bill states equitable grounds of relief. *Arnold v. Grimes and Chapman*, 2 Iowa, 1; *McClenehen v. Chambers*, 1 Monr., 43; *Taylor v. McCracken*, 2 Blackf., 260; *Gallagher's Executors v. Roberts*, 1 Wash. C. C. R., 320; *Lindley v. Cravens*, 2 Blackf., 426.

III. The right of plaintiff to set off the money paid to defendant for intoxicating liquors against the amount paid by defendant to Langworthy, is derived from § 15 of the act of January 22, 1855. (Rev. 1860, § 1751.)

Burt, Angell & Lyon for the appellee, contended.

I. That the former trial in the ejectment suit estops plaintiff from again litigating the same question in this action. *Dotey v. Brown*, 4 N. Y., 71, and the cases there cited; *White v. Coatsworth*, 6 Id., 137; *Campbell v. Ayres*, 1 Iowa, 257; *Wood v. Jackson*, 8 Wend., 9; *Ethridge v. Osborn*, 12 Wend., 399; *Gardner v. Buckbee*, 3 Cow., 120; 2 Phill. Ev., 1859, notes 262 and 292; *Heichew v. Hamilton*, 4 G. Greene, 317; *Davis v. Milburn*, 4 Iowa, 246.

II. That the character of the consideration should have been set up in the ejectment suit, and the party having failed to avail himself of it, he is estopped in this action. *Emberry v. Connor*, 3 N. Y., 522; *Braner v. Hone*, 2 Barb. 596; *Vail v. Vail*, 2 Barb., 241; *Voorhies v. The Bank of*

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the United States, 10 Pet., 449; *Outram v. Morewood*, 3 East., 346; *Ethridge v. Osborn*, 12 Wend., 399; 2 Phil. Ev., 29; Wil. Eq. Jur., 161.

III. That he cannot now impeach the judgment in that action unless it was obtained by the fraud of the other party, or by mistake, unmixed with negligence on his own part. *Marine Insurance Company v. Hodgdon*, 7 Cranch, 332; *Duncan v. Lyon*, 3 John., 356; Willard's Eq. Jur., 160; *Kriechbaum v. Bridges*, 1 Iowa, 14.

IV. The evidence does not show that the contract was made in Iowa, or with a view to enabling the purchaser to violate the act of January 22d, 1855.

LOWE, J. — Suit in chancery commenced under the following circumstances: In October, 1858, plaintiff was indebted to defendants for liquors before that time purchased of them in the sum of about eleven hundred dollars, to secure the payment of which he, the said plaintiff, assigned to the defendants, a title bond which he held from L. H. Langworthy for the purchase of a lot in said Langworthy's addition to the city of Dubuque. By the terms of said bond, a conveyance of said lot was agreed to be made, upon the payment of \$1,000. The plaintiff had paid a considerable portion of this sum, and made, as he claimed, valuable improvements upon the lot. In assigning the bond for the purpose aforesaid, the plaintiff authorized the defendants to obtain a deed for the property therein described in their own name, which they did by paying \$398.38, the balance of the purchase money. Afterwards, upon this title deed, the defendants brought their action of right for the possession of said lot, and ejected the plaintiff, who duly appeared in said action, and made his defense.

In this attitude of things the plaintiff files his bill in this case to redeem said lot from the defendants, upon the

ground that his indebtedness to the defendants was for the purchase of liquors in violation of law, and therefore not recoverable; that he had before that time purchased and paid to defendants a thousand dollars for intoxicating liquors, in contravention of the act for the suppression of intemperance, which, by the terms of said act (§ 1571, Code of 1860,) became a debt due from defendants to him.

The sale of such liquors in violation of law is denied, and the judgment at law in the action of right is pleaded in bar to a second hearing upon the subject of this controversy. On the hearing of the cause, the court below found the facts and the equities with the defendants, and rendered a decree accordingly. The correctness of this decision, in our judgment is supported by the record. What passed between the parties at Dubuque only amounted at most to an executory agreement depending upon several contingencies that the defendants would furnish to the plaintiff a certain amount of liquors. But it did not include the elements of a contract of sale, which either party could in law demand and enforce against the other. Nevertheless, it is insisted by counsel in argument that if it should be held that the contract for the purchase of said liquors occurred at St. Louis, in the state of Missouri, still that the sale there by the vendors was made *with intent* to enable the plaintiff to violate the provisions of the statute of this state passed for the suppression of intemperance.

If this was true, the act would fall within the prohibitory clauses of said statute, and render the sale void, and the parties obnoxious to its penalties and forfeitures. But we are constrained to say from the evidence in the record that this is mere assumption. There is no proof to support the allegation; not even, that the vendors had any knowledge of the existence of such a law. If, then, the sale took place in St. Louis, and with no intent to enable the pur-

Massie v. Sharpe.

chaser to violate the laws of Iowa, the whole equity of the plaintiff's bill falls to the ground.

But in addition to this, it is true that in the absence of all fraud, accident or mistake, which is not alleged or pretended to have occurred in the action at law which established the title to the property in controversy in the defendants, it is not competent for the plaintiff to relitigate a matter which he could have successfully set up as a defense in the law action. For instance, it is very evident from the facts in this case, that the deed from Langworthy to defendants for the lot in question was, as between the parties to this controversy, a mortgage in fact, although not in form. If the consideration of this deed or mortgage was the sale of intoxicating liquors in violation of law, it was by the terms of the statute illegal and void in the hands of the holder, and would constitute a defense to an action founded upon it. This the plaintiff neglected to make, in the action at law; and his negligence in this respect is not now to be rewarded by affording him a second opportunity for doing so, in chancery.

Affirmed.

MASSIE V. SHARPE *et al.*

1. MORTGAGE DEBT: ORDER OF PAYMENT. Where several notes are secured by the same mortgage the proceeds arising from the sale of the mortgage property should be applied in their payment in the order of their maturity, following *Grapengether v. Fjervary*, 9 Iowa, 163; *Rankin v. Mayor*, Id., 297; *Sangster v. Love et al.*, 11 Id., 580; *Hinds v. Mooers et al.*, Id., 211; *Reeder v. Carey et al.*, ante.

Maassie v. Sharpe.

Appeal from Dubuque City Court.

FRIDAY, OCTOBER 10.

Burt, Angel & Lyon, for the appellant, relied upon *Rankin et al. v. Majors*, 9 Iowa, 297; *Grapengether v. Fejervary*, Id. 163.

No appearance for the appellee.

LOWE, J. — The mortgage for the foreclosure of which this suit was brought, was given to secure the payment of five thousand dollars, payable in seven annual installments. The last six, evidenced by notes, as was also the first, were assigned by Elizabeth Mann and husband, mortgagees, to plaintiff, retaining the first note themselves. The assignee, in foreclosing, makes the mortgagees, Elizabeth Mann, and her husband, James Mann, parties defendant, also other senior and junior incumbrancers.

On hearing, the court decreed that the plaintiff and Elizabeth Mann and her husband should be paid *pro rata* after extinguishing prior claims, from the proceeds of the mortgaged premises. This is properly made a ground of complaint, and the decree will be modified so as to conform to our previous rulings on this subject. *Grapengether v. Fejervary*, 9 Iowa, 163; *Rankin v. Major*, Id., 297; *Sangster v. Love et al.*, 11 Id., 580; *Hinds v. Mooers et al.*, Id., 211; *Reeder v. Cary et al.*, *ante*.

A modified decree will be entered in this court.

Reversed.

Levally v. Ellis.

LEVALLY *et al.* v. ELLIS *et al.*

1. **COPARTNERSHIP DEBTS.** The individual property of a partner can be subjected to the satisfaction of a judgment against the firm as such only by *scire facias*; it is otherwise when the judgment on a copartnership obligation is against the members of the firm as individuals.

Appeal from Bremer District Court.

SATURDAY, OCTOBER 11.

THE facts are stated in the opinion of the court.

John E. Burke for the appellants.

Wright & Avery for the appellees.

BALDWIN, C. J. — Bennett, White & Co. obtained a judgment by confession against Harmon & Hamilton on the 12th day of April, 1860. On the 20th of July, following, Hamilton and wife mortgaged the property upon which they were then living to the school fund, as security for a note of \$350. The plaintiffs were also sureties upon this note. In May, 1861, Hamilton and wife sold the premises mortgaged and moved to California. After this sale, the said Bennett, White & Co. issued an execution upon the judgment against Harmon & Hamilton, and caused the property mortgaged to the school fund, to be levied upon, and offered for sale.

The complainants by this proceeding seek to enjoin this sale, claiming that the property levied upon was the individual property of one of the members of said firm, that it was not liable for a firm debt until all of the firm property had been exhausted. Also claiming that the property levied upon was the homestead of Hamilton, and not liable to execution and sale for the said firm debt. Other matters are set up as causes why the sale should be enjoined, such

Levally v. Ellis.

as a confederation to oppress the complainants, and the agreement of Harmon to pay all of the firm debts, which are immaterial for the present to be determined.

The defendants answer, denying all the allegations of the bill, and upon the answer filed, moved to dissolve the injunction, which motion was overruled, and they appeal.

If the judgment upon the power to confess, was against the firm of Harmon & Hamilton, as a firm, the property of Hamilton should not be levied upon or made liable to the partnership debt, without giving to the individual members of said firm an opportunity to show cause why it should not be taken. If, however, the judgment was against the individual members of the firm, the property of Hamilton was liable, unless exempt as his homestead. The judgment entry is not before us. The power of attorney, authorizing the confession, shows that it was for a firm debt, but they each authorize the clerk to render a separate judgment. A copy of the execution issued tends to show that the judgment was against the firm alone. The complainants claim that it was a judgment against the firm alone; respondents claim that it is against the individual members of the firm. This question cannot be determined from the pleadings, and as this is the controlling question in the case, we would not undertake to say that the court erred in refusing to dissolve the injunction.

We think the complainants can claim nothing upon the ground that the property was the homestead of Hamilton. It is conceded that it was not the homestead at the time the debt to Bennett, White & Co. was contracted, nor was it used as a homestead when levied upon. If Hamilton himself could claim its exemption it would be upon the sole ground that the judgment creditors had not exhausted all other property before resorting to the homestead.

Affirmed.

Brown v. Newman.

BROWN v. NEWMAN.

1. SERVICE OF NOTICE. Service of original notice upon the agent of defendant is not sufficient.
2. APPEARANCE BY AGENT. The defendant may appear by an agent and consent to judgment, and it is not necessary that the authority to make such appearance should be entered of record.

Appeal from Dubuque District Court.

SATURDAY, OCTOBER 11.

THE facts are stated in the opinion of the court.

Wilson, Uiley & Doud for the appellant.

The service upon the agent in this case is not sufficient, it does not relate to business growing out of an agency, and the defendant is not a copartnership or corporation. *Chittenden v. Hobbs*, 9 Iowa, 417; *Grant v. Harlon*, 11 Id., 429; *Foley v. Connelly*, 9 Id., 240; *Carr v. Kapp*, 3 Id., 80; *Byington v. Crosthwait*, 1 Id., 148. The agent exhibited no authority to bind the defendant, and before the court could take jurisdiction his authority should appear, 8 Ind., 57; *Lane v. Crosby*, 42 Maine, 327; 35 Id., 129; *Evans v. Pierce*, 2 Scam., 468; *Spear v. Carter et al.*, 1 Manning (Mich.), 19; *Benn v. Best*, 5 Wend., 293; 4 John., 292; *Brown v. Cady*, 19 Wend., 477; *Stoddard v. Holmes*, 1 Cow., 245; 15 John., 244.

John L. Harvey for the appellee. The defect in service was caused by the appearance of the principal defendant and the garnishee. *Bell v. Pierson*, Morris, 21; *Hotchkiss v. Thompson*, Id., 156; *Houston v. Walcott & Co.*, 1 Iowa, 86; *Voorhies & Co. v. Ewbank*, 6 Id., 274; *Graves v. Cole*, 2 G. Greene, 467; *Winchester v. Cox*, Id., 575; *Drake v. Atchison*, 4 Id., 297; *Lorimer et al. v. The Bank of Illinois*,

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Morris, 228; *Morrow v. Carpenter*, 1 G. Greene, 469; *Chittenden & Co. v. Hobbs et al.*, 9 Iowa, 418.

LOWE, J. — John Newman brought his suit by attachment before a justice, against P. Morrissey, on a note of \$25, and obtained a judgment thereon by confession; also a judgment against Michael Brown for some \$29.60, upon an acknowledgment of an indebtedness for that amount to the principal debtor. Brown afterwards removed the proceedings against him in garnishment, by writ of error into the District Court, alleging that the same were erroneous, because the judgment against Morrissey, the principal debtor, was void, no legal service having been made upon him. The record shows a service upon Thomas Morrissey, the agent of defendant. This was not a legal service; but it also shows that the agent appeared and assented to a judgment for the amount of the note sued on. This it was competent for the agent to do. Revision of 1860, § 8866. Nor is it necessary that his authority for doing so should be made of record. The appellant seeks to get rid of the judgment rendered against him in garnishment upon the ground that the judgment against the principal debtor was a nullity, for the reason alleged. This position is unsustained by the record. Judgment below

Affirmed.

WATSON V. HUNKINS.

1. ASSIGNMENT OF LEASE. A lease may be assigned by the lessor so as to give to the assignee the right to recover the rent reserved, without a sale or transfer of the reversionary interest.

13 547
98 14

Watson v. Hunkins.

Appeal from Dubuque District Court.

SATURDAY, OCTOBER 11.

ON the 20th of February, 1856, Finley being the owner in fee of certain lots in Dubuque, leased the same to Smith, McKinlay & Poor, for ten years, with the privilege of renewal; the rent payable quarterly. The concluding clause of the lease is as follows: "And the parties aforesaid, who contract in behalf of themselves, their heirs and assigns, as to the matters aforesaid, hereby bind themselves, their heirs and assigns to the covenants aforesaid, by their respective signatures hereto affixed. The said rent shall be a lien on said contemplated improvements."

October 29, 1856, Smith, McKinlay & Poor, by deed of trust, conveyed all their interest in the premises to Willis, as trustee, to secure a debt owing by them to the defendant, Hunkins. Under this deed, the premises were sold on the 3d of April, 1860, to defendant, who has since held the same, and collected the rents of the tenants in possession.

In 1857, (Nov. 30th,) Finley made a mortgage upon the premises leased, to plaintiff, to secure a debt due from Finley, Burton & Co. This mortgage contains this condition: "If said note is not paid according to its tenor and effect, then the said Watson is to receive all the rents and benefits to be derived from said lease, and that would otherwise inure to said Finley, from and after the date of said forfeiture of the condition herein mentioned, and from that date this deed shall operate as an assignment of the interest of said Finley in said lease, until said debt is fully satisfied and paid by the foreclosure of this mortgage or otherwise."

This mortgage was not paid, and Watson brought this action against Hunkins to collect the rent accruing after April 3d, 1860, claiming that Hunkins is liable, and that

Watson v. Hunkins.

he, Watson, by the terms of his mortgage, without its foreclosure, can maintain his action therefor. Judgment for plaintiff and defendant appeals.

Wilson, Utley & Doud for the appellants. There was no privity of estate between Watson, the mortgagee, and Hunkins, the assignee of the lease. 1 Greenl. Ev., § 189; 2 Bac. Abr., Cov. E., 3; Rev., 1860, § 2217; 4 Kent Com., 580 (8th ed.), 1 Chit. Pl., 16; Mo., 253.

Samuels, Allison & Crane for the appellee. 1. The defendant was in possession, and this is sufficient to show that he was an assignee of the lease. *Provost v. Calder*, 2 Wend., 522; 2 Stark., 437; Taylor's Land. and Ten., 450; 3 Ed. Phill. Ev., 466; *Williams v. Woodward*, 2 Wend., 486; *Walton v. Cunley*, 14 Wend., 63. 2. As assignee, he must perform all the covenants which are annexed to the estate. Taylor's L. and T., § 437; *Childs v. Clark*, 3 Barb. Ch., 61; 9 Cow., 88; *Walton v. Cunley*, 14 Wend., 64; *Walker v. Reeve*, Doug., 461, note; Bull N. P., 157; *Howland v. Coffin*, 12 Pick., 125; 2 Mass., 460; *Booth v. Stow*, 1 Com., 244; *Spencer's case*, 1 Smith's L. C., 106; 3. By the mortgage, Finley assigned to plaintiff the reversion of the premises, and the right to the rent in express terms, after which he could not maintain an action for a breach in his own right. 20 Barb., 274; Taylor's Land. and T., 447; 2 Hill, 294; 8 Cow., 206; *Allen v. Bryan*, 5 B. & C., 512. 4. At common law, the assignee of the reversion may maintain an action to recover the rent against the assignee of the lease. See cases, *supra*.

WRIGHT, J. — Under the facts as above recited, the court charged the jury: "If you believe that Finley leased the real estate to Smith, McKinlay & Poor; that he assigned the lease to Watson; that the interest of the lessees was sold to Hunkins, and that he, after his purchase, received

Watson v. Hunkins.

rent from the occupants of the premises, this would render him liable from the time of his purchase, and receiving rents — that the assignee of a lessor may maintain his action against the purchaser of the leasehold interest from the lessees." And refused this instruction asked by defendant: "That the transfer to Watson by Finley of his interest in the lease does not constitute Watson a landlord between whom and Hunkins the relation of landlord and tenant exists — that if there is no privity of estate between Watson and Hunkins, their verdict must be for defendant."

In these rulings there was no error — at least, none working such prejudice as to justify a reversal of the cause. As sustaining this view, see *Abercrombie v. Redpath*, 1 Iowa, 111; *Demarest v. Willard*, 8 Cow., 206; *Willard v. Tillman*, 2 Hill, 274; *Fanning v. Stimson*, ante; Taylor's Land. and Ten., 436-37-450. Watson is not, of course, the landlord of the premises, in the sense of owning the fee, or any title in the estate. Nor is this necessary. For in this state, a lease may be assigned by the lessor, so as to give to the assignee the right to recover the rent reserved, without a sale or transfer of the reversionary interest. The doctrine of the common law, that choses in action are not assignable, does not obtain with us. The agreement between Finley, the lessor, and Watson, the assignee, amounts to an assignment of the rent reserved, to be applied on the payment of the mortgage debt.

Affirmed.

COLE v. DEALHAM, Garnishee.

1. GENERAL ASSIGNMENT: MORTGAGE. Where a debtor conveyed a portion of his property to two creditors by mortgage, without their knowledge, and at the same time conveyed the remainder to a trustee by an assignment for the benefit of his creditors, all of which was done with a view to insolvency, it was held a general assignment in which creditors were preferred, and therefore void: following and re-affirming *Burrows v. Lehn-dorff*, 8 Iowa, 96.
2. AGREEMENT TO EXECUTE A MORTGAGE. A court of equity will enforce a valid agreement to execute a mortgage, against the party or a subsequent purchaser with notice; but a promise to secure a creditor is not such an agreement to execute a mortgage as can be specifically enforced.
3. GENERAL AND PARTIAL ASSIGNMENTS. A debtor may in good faith make a partial assignment preferring creditors; but when the whole transaction assumes the character and is in legal effect a general assignment, he can give no preference.

18	551
95	509
13	551
96	749

Appeal from Dubuque City Court.

SATURDAY, OCTOBER 11.

COLE obtained a judgment against one Friedlander, and, under an execution issued thereon, garnisheed the defendant, Dealham. From the answer of the garnishee, it appears that he had certain property which he claimed had come into his hands as the assignee of Friedlander, under a general assignment. The assignment was not denied by plaintiff, but it was insisted that it was fraudulent and void. Upon this issue testimony was taken, and the cause submitted to the court. Judgment for plaintiff, and defendant appeals.

Wilson, Uiley & Doud for the appellants, in support of the validity of the assignment, cited the following authorities: *Fairbanks et al. v. Haynes et al.*, 23 Pick., 323; *Brown et al. v. Foster*, 2 Met., 152; *Bates v. Coe*, 10 Conn., 280; *Isham v. Morgan*, 9 Id., 374; *Burn v. Burn*, 3 Ves., Jr.,

578; *Foster v. Post*, 9 S. & R., 11; *Hurst v. Hurst*, 2 Wash. C. C., 69; Sug. Vendors, 336; *Blaim et al. v. Nagle et al.*, 4 Ohio State, 45. As to the rights acquired under the mortgages, 4 Kent, 454; *Maynard v. Maynard et al.*, 10 Mass., 456; *Fay v. Richardson*, 7 Pick., 91; *Jackson v. Richards*, 6 Cow., 617; *Jackson v. Leek*, 12 Wend., 105; *Chess v. Chess*, 1 Pen. & W., 32; *Jackson v. Phipps*, 12 John., 418; *Barns v. Hatch*, 3 N. H., 304; *Gilbert v. The North American Fire Insurance Company*, 28 Wend., 43; *Jackson v. Perkins*, 2 Wend., 308; *The Commercial Bank v. Reckless*, 1 Halst. (N. J.), 430.

E. McCenney and W. J. Knight for the appellee, relied upon *Burrows v. Lehdorff*, 8 Iowa, 96.

WRIGHT, J. — Counsel for appellant have pressed their positions with great earnestness and ability, but have failed to satisfy us that in its essential principles this case differs from that of *Burrows v. Lehdorff*, 8 Iowa, 96. Indeed, it is seldom that we meet with cases, running more nearly parallel in all their leading facts. Here there was a general assignment. There the transaction was held to amount in legal effect to such an assignment. In that case, as in this, the attempted transfer was attacked upon the ground that it was not made for the benefit of all the creditors, in proportion to the amount of their respective claims. There the several mortgages and deeds of trust were made substantially at the same time, and presented by the vendor and grantor for record, five minutes intervening between the filing of each. Here the assignor made two mortgages, filed them for record without the knowledge of the mortgagees, and within five minutes thereafter filed the deed of general assignment, bearing the same date, as that on which the mortgages were acknowledged. The question is not whether these mortgages are valid, but whether the assign-

ment can be upheld. The court below held, taking all the facts into consideration, that there was an intention to prefer creditors: that the mortgages and assignment were to be treated as one transaction; and that the assignee could not hold the property, therefore, under such attempted transfer. With this conclusion we do not feel justified in interfering.

It is proper, however, that we notice some of the more important features of the case, which counsel claim distinguish it from that above cited. One of the mortgages was made to Buckingham, to secure a debt of two hundred and fifty dollars, money loaned. He testified that he loaned the money "on the understanding that I was to be secured"—"that I was to be secured, if anything happened." This was on the 27th of September; but witness knew nothing of the mortgage until December 28, 1861, two days before he was sworn as a witness. The other mortgage was made to one Waters, who testifies that he loaned Friedlander \$150, August 17, 1861, who at the time told him "he would make him secure." The mortgages and assignment were all acknowledged and filed for record October 15, 1861. It is now claimed that the agreement for security between Friedlander and the mortgagees, made at the time of the respective loans, created a lien in equity, good against the subsequent assignment for the benefit of creditors. That a valid agreement for a mortgage may be specifically enforced in equity against a party or subsequent purchaser with notice, or a general assignment even, we do not controvert. But to apply the rule, there must be an agreement that could be enforced. Here, giving to the testimony all that can be claimed for it, there was no such agreement. We are not aware of any general equity principle that would enforce it, and there is certainly no statutory provision affording a remedy. And we should certainly want some very clear and well reasoned case, recognizing the right to enforce such lien under a verbal contract as general and

vague as in this instance—referring to no specific property—before we should be inclined to follow it. If by possibility the case could be found and followed, it would be “without respect or veneration.”

The case, then, is unaffected by these prior understandings. If any rights have accrued to any persons under the mortgages, they are to be measured by those instruments, and not by the vague talk which preceded their execution.

The mortgages bear date August 17 and September 27, 1861. They were not finally executed and acknowledged, however, until October 15th of that year. The assignment is valid on its face, and is, in all respects, a complete instrument of itself. It is now claimed that the giving of the mortgages and the execution of the assignment are separate and entirely independent acts, and, that being so, there was no such giving of preference to certain creditors as should invalidate the assignment. The argument is, that the debtor, not acting in view of a general assignment, had a right to prefer his creditors, and that the whole face of the transaction conclusively rebuts the idea that these mortgages were a part of the final assignment; that they were made for an honest, legitimate purpose, and long before insolvency or the expectation thereof. That a debtor may, in good faith, make a partial assignment, preferring certain creditors, is not denied. But when the whole transaction assumes the character, and is, in legal effect, a general assignment, he can give no preference. If he does, the attempted transfer is declared void by the statute. And whether, in this case, these mortgages were really made in good faith, long prior to the assignment; or whether they were written out or filled up by the mortgagor, signed by and retained by him, awaiting the financial complexion of the coming months, and which he finally concluded to and did use at the same time that he declared his insolvency, are questions of fact

Dubuque Female College v. The District Township of the City of Dubuque.

passed upon by the court below, and the construction put upon them we are not prepared to gainsay.

If the facts of this case brought it within the rule recognized in *Fairbanks v. Haynes*, 23 Pick., 323, and *Brown v. Foster*, 2 Met., 152, we should most unhesitatingly uphold the assignment. To our mind, however, they are more nearly assimilated to that of *Perry v. Holden*, 22 Pick., 269. True, the cases are not precisely similar, and yet they are in principle quite analogous. And believing that the court found correctly in determining that these instruments were to be construed together as parts of one and the same transaction—as an assignment, conveyance and disposition of the insolvent's property—and that as thus construed they were not valid as against plaintiff, the judgment stands

Affirmed.

**DUBUQUE FEMALE COLLEGE v. THE DISTRICT TOWNSHIP
OF THE CITY OF DUBUQUE.**

1. **CONSTRUCTION OF SCHOOL LAW.** A board of directors of a school district may, under § 8 and the provisions of § 1 of chapter 52, Laws of 1858, bind the corporation by contracts entered into after the election of their successors and before their qualification.
2. **BOARD OF EDUCATION: CURATIVE ACT.** The Board of Education has power to legalize and confirm the acts of *de facto* officers acting under a school law which has been declared invalid.
3. **CORPORATION: RATIFICATION OF CONTRACT.** A school district may, through its officers, ratify or adopt any contract made by officers *de facto*, if the officer ratifying such unauthorized contract had authority to bind the corporation; and contracts made in the name of a corporation, before it has a legal existence, may be so ratified and adopted after it is incorporated.

13	555
82	304
13	555
107	32
13	555
117	336
117	699

13	555
140	750

Dubuque Female College v. The District Township of the City of Dubuque.

Appeal from Dubuque District Court.

SATURDAY, OCTOBER 11.

ON the 12th day of November, 1858, defendant leased from plaintiff a certain building known as a Female College "for a school of a high grade," &c. By the terms of the lease it was provided that if the electors of the district at the election on the second Monday in March, A. D., 1859, determined by ballot to purchase said building for \$12,500, the lease was to terminate and the sale to be made. This agreement was signed by the trustees of the college and by Wiltse, Bissell and Cook as the "District Board of Directors of Township of city of Dubuque." This Board was elected on the first Monday in May, 1858. An election was held as contemplated by the lease, which resulted in favor of the purchase. A deed was accordingly made for the consideration of \$12,500 of date March 17, 1859, and a mortgage of same date signed by the same Directors, to secure the purchase money. This action is brought to foreclose this mortgage. The defense is a want of power to make it or to take and hold the property. Decree for plaintiff and defendant appeals.

Burt, Angell & Lyon for the appellant, contended: 1. That the referee erred in finding facts in the case not embraced in the statement of facts agreed upon. 2. That he erred in finding that the Board of Education legalized the existence of the District Township of Dubuque, as constituted by the act of March 12th, 1858; parts 1 and 8, school laws of Iowa. 3. The referee erred in finding that the District Township of Dubuque, at the time of the execution of the deed from the plaintiff, and of the mortgage claimed on had a separate existence as an independent school district, and was capable of receiving title and executing a mort-

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gage; parts 8 and 18 of the school laws; *Falconer v. Higgins*, 2 McLean C. C. R., 196; *Fire Department of New York v. Kiss*, 10 Wend., 266; *The District Township of the city of Dubuque v. The city of Dubuque*, 7 Iowa, 262; *High School, &c., Clayton County*, 9 Id., 175. 4. The referee erred in finding that H. A. Wiltse, F. E. Bissell and P. B. Cook, had power and authority to make the purchase and accept the deed, and execute the mortgage claimed on as the act and deed of this defendant, and that the same is valid against this defendant. See former authorities referred to above. 4 Kent, 462 (marg.); 9 John., 73; *Hosubeck v. Westbrook*, Hobson, 33; *Ang. & Ames Corporations*, § 176; *Miller v. Chittenden et al.*, 2 Iowa, 315.

Bissell & Shiras for the appellee.

WRIGHT, J. — The directors, Wiltse, Bissell and Cook were elected in May, 1858, and their successors on the second Monday (14th) of March, 1859. By the 8th section of chapter 52, Laws of 1858, taken in connection with the provision in the 1st section, these officers were elected for one year, and until their successors were elected and qualified. And while, therefore, by a change of legislation their successors were elected prior to the making of this contract, yet as they did not qualify until after, (to wit, on the 19th of March,) their right to contract thus for, is beyond controversy.

But it is denied that the district had any existence as an independent school district, or that it was capable of receiving a title or executing a mortgage. And while it is conceded that this power existed by the terms of the act of March 12th, 1858, (ch. 52, p. 57,) yet the argument is that this act was void for conflict with the Constitution; that it was so declared by this court (7 Iowa, 262); and that there has been no legislation by the General Assembly.

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or Board of Education, legalizing the acts of officers in city districts, or authorizing their formation, or at least, none prior to the making of this mortgage. And while it is also admitted that the district was organized under the act of March, 1858, and that Wiltse and others were elected directors under that act and organization, yet it is urged that as said act was void, so was that election; and that it was not until the 19th of March, A. D., 1859, when the new board was qualified, that officers existed capable of making a contract. The deed and mortgage being void therefore, as appellant insists, it is further claimed that they cannot be made valid by ratification, but alone by a new execution and delivery.

The city of Dubuque was a separate school district before the act of March 12, 1858 (Laws of 1857, p. 354). By the act of 1858, each civil Township was declared a school district, and each incorporated city including the territory annexed thereto for school purposes, containing not less than one thousand inhabitants, was invested with like corporate powers—the officers therein were to be elected in the same manner—were to possess and exercise the same powers, and perform the same duties as required of like officers in other districts; and in all respects such (city) districts were subject to the provisions of the general law, so far as applicable. This act was declared invalid on the 9th of December, 1858. On the 15th of that month the Board of Education declared that all elections which had been held—all acts done and contracts made—any tax levied—any rights acquired under said act of March, 1858, were legalized and confirmed as fully and effectually as though the same had taken place under legal enactment. December 24th, 1858, a general school law was passed by the Board of Education, but this failed to contain the provision of the Act of 12th March on the subject of incorporated cities and towns. By the 5th section, however, "Every

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school district which is now or may hereafter be organized in this State," is made a body corporate by the name of "the district Township of _____ in the County of _____ and State of Iowa." On the same day an Act was passed conferring certain powers on towns and cities for school purposes. By this it is provided that any city or incorporated town, including the territory annexed thereto for school purposes, may constitute a separate school district. At the request of ten voters the municipal authorities are required to provide for the taking the sense of the people on the subject within the contemplated limits by means of a public ballot. Should a majority vote in favor of a separate organization, an early day is to be fixed for the election of a district board, having the same general powers, &c., as attach to a like board in the township districts. This board is to consist of a President, Vice-President, Secretary, Treasurer, and three Directors.

These are all the provisions bearing upon the question involved. Under this last act the city of Dubuque did, in February, 1859, vote in favor of a separate organization, and in March elected a board, who were qualified on the 19th of that month. In giving a construction to these acts, we remark that we think it was competent for the Board of Education to legalize and confirm the acts of officers elected, and transacting business, under that declared invalid. They were officers *de facto*, and the same power which the General Assembly possesses upon general subjects in legalizing and confirming the acts of officers or persons in the discharge of any particular trust or duty, the Board of Education possesses in relation to common schools and the school system. The question is whether this power has been exercised in this particular instance, so far as to continue in existence, and bring the districts provided for in the 1st section of the act of 1858—which we style the city or town districts—without action on the part

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of the municipal authorities and people to organize under the Act of December 24th, 1858, conferring "certain powers on cities and towns." This question is one of difficulty. Its determination is not necessary from the view we take of another point in the case, and as we should probably not be unanimous in the construction to be given to this legislation, we deem it best to leave it open—and especially so as from our peculiar legislation the question is of but little practical importance.

The other question is whether it was competent for the Board elected in March, 1859, to ratify and adopt the act of their predecessors, and whether this has been done, so far as to make valid and binding the contract and mortgage touching the "High School property." And upon this subject we entertain no doubt. Without referring to all these acts, it is sufficient to say that from March 23, 1859, until the commencement of this action in May 1861, there was one unbroken series of acts recognizing the validity of the contract, showing that the property was in the possession of and used by the district—that repairs were made upon it—that negotiations were carried on to arrange the debt and procure time for its payment—had the same insured—all which matters appear from the records of said board. These officers had authority to execute this mortgage—and whatever they could do directly, their subsequent ratification would legalize and make valid. The district is a corporation and through its officers it could adopt any contract of those acting *de facto*—if the officers so ratifying the unauthorized act had authority to make such contract.

Appellant insists however, that there could be no ratification, for the reason that the corporation for which these persons assumed to act had no existence at the time of the conveyance and deed, and that the authorities on the subject of ratification all refer to existing corporations. Such

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is not our understanding of the rule. It is well settled that a board may accept a contract by a vote or by a tacit and implied assent. And the same rule applies to the appointment of an agent by a corporation. *Bank v. Dandridge*, 12 Wheat., 83. The same presumptions are applicable to corporations as to natural persons. Ang. & A. Cor., § 284. As applicable, see *Dunn v. St. Andrews Church*, 14 John., 118, where the plaintiff was held entitled to compensation for his services without proof of an express promise — without evidence of a vote appointing him — but upon the ground that the records of the corporation contained entries of the payment of money to him for his services from which an implied promise was found. And see *Merriek v. The Burlington and Warren Plank Road Company*, 11 Iowa, 74.

If a corporation ratify an unauthorized act of an agent, then as in the case of natural persons, the ratification is equal to a prior authority. And an act done before may be adopted after the incorporation, so as to be equally binding and conclusive. As a natural person may adopt and take the benefit of an act in relation to property in which at the time of its occurrence he had no interest whatever, but in which he subsequently acquires an interest, so may a corporation on contracts made prior to its existence. The two cases of *Goody v. Colchester and Stoner & Valley Railway Company*, 15 Eng. L. & E., 596, and *Preston v. Liverpool, &c., Company*, 7 Id., 124, are in point.

Affirmed.

Kurz v. Holbrook.

KURZ V. HOLBROOK *et al.*

1. PLEADING USURY. Usury may be set up in an answer by allegations of facts showing that illegal interest has been contracted for, without being pleaded in express terms.
2. PROMISSORY NOTE: INDORSEMENT. The indorsement of a promissory note after maturity carries with it all equities between the parties.

Appeal from Dubuque City Court.

MONDAY, OCTOBER 13.

THE facts will be found in the opinion of the court.

Bissell & Shiras for appellant.

Poor, Adams & Cram for appellee.

BALDWIN, C. J. — Holbrook, one of the respondents, purchased a lot in the city of Dubuque of Joseph and Franz J. Jaeggi, and gave back a mortgage to secure the purchase-money.

Upon the first of March, 1857, the interest and \$100 of the principal was paid, leaving the balance due, \$700. The parties then agreed to extend the time of payment one year, the defendant agreeing to pay 20 per cent interest. The lot was purchased for the Congregational Society of Dubuque, and the trustees thereof gave to Jaeggi their note for \$70, the extra interest. The extension expired, and the interest and extra interest was not paid. Another extension was then agreed upon for one year, at twenty-five per cent interest, and the trustees again gave their note for \$228, the same including the extra interest for two years, and some \$22 received by them besides the interest.

On the 22d February, 1859, one Amsden, in behalf of the trustees, paid to the said Jaeggi \$375, lifting the \$228 note, and having a credit of \$147 indorsed on the principal. On the first day of March, 1860, the further sum of \$70 was paid by the said trustees, and this amount indorsed upon

Kurz v. Holbrook

the note. Afterwards the note and mortgage was assigned to plaintiff, who brought this action of foreclosure.

It is conceded that the lot was purchased by the respondent Holbrook, for the use of the Congregational Society of Dubuque, and that this association is the party at interest in this proceeding. The defendants set up in their answer the payments under the several agreements, of the extra interest, and claim that it should be credited upon the principal sum. The complainant claims that he was not a party to any usurious contract; that the defendants have failed to plead usury; and that the payments that have been made should not be credited upon the note, as such sums were paid in consideration of the extension; and that the court erred in the admission of evidence to show usury, when there was no plea to sustain the same.

Conceding that the court erred in the admission of this evidence, does this help the case so far as the plaintiff is concerned? The answer of defendants sets up these payments, and for what they were made, and this is not replied to. But the answer is, in substance, a plea of usury. It shows that the original payee of the note received a greater interest than the law allowed him to take.

The plaintiff took the note after it became due, and of course subject to all the equities between the original parties. The payments made by the trustees were for the benefit of, and should have been credited to, Holbrook. Independent of this question, as to the admissibility of the evidence objected to, (and we are not prepared to say the court erred in its admission,) the pleadings show plainly that there was an unlawful rate of interest agreed upon. Therefore, whatever payments were made by Holbrook himself, or through the trustees, for him, the law applies them in liquidation of the amount legally due. The court, therefore, did not err in giving the defendant credit for the sums thus paid.

Affirmed.

Wheeler v. Smith.

WHEELER V. SMITH.

1. **DEPOSITIONS.** A deposition taken by one party may be used in evidence by the other; following *Pelamourges v. Clark*, 9 Iowa, 1; *Crick v. McClintic*, 4 G. Greene, 290.
2. **BILLS OF EXCEPTIONS: PRACTICE.** The Supreme Court will not consider instructions or exceptions to evidence which are not by bill of exceptions or otherwise made a part of the record.
3. **ORDER OF EVIDENCE.** The Court may in the exercise of its discretion receive evidence after the testimony has been closed; and the Supreme Court will interfere with the exercise of such discretion only in cases of abuse.
4. **EVIDENCE IN REPLEVIN.** In an action of replevin by an administrator the plaintiff may explain his inventory of the property of the estate he represents by parol evidence showing that it embraces the proceeds of a sale of the property in controversy.

Appeal from Winneshiek District Court.

MONDAY, OCTOBER 13.

Tupper & Clarke for appellant.

Noble & Beckwith for appellee.

WRIGHT, J. — 1. The court did not err in permitting plaintiff to read as evidence the deposition of the witness, Moses, the same having been taken at the instance of defendant. *Pelamourges v. Clarke et al.*, 9 Iowa, 1; *Crick v. McClintic*, 4 G. Greene, 290.

2. We give no attention to the errors assigned, so far as they relate to instructions given or refused, and the reception of a letter, said to have been written by plaintiff to an agent, for the reason that none of these matters are so identified by the bill of exceptions or otherwise as to bring them properly before us. (This action was commenced in 1857.) *Harmon v. Chandler*, 3 Iowa, 150; *Lewis v. Detrick*, Id., 316; *Greene & Stone v. McFadden & Co.*, 5 Id., 549.

Kienne v. Anderson.

3. The action was replevin — plaintiff died, and her heir, and executrix, was substituted. It seems that during the argument defendant's counsel insisted that the property in dispute had not been included in the inventory of the property of decedent, as returned by the executrix. Plaintiff claimed that it was included, and proposed to show that the property therein included, was the proceeds of the sale of the property in dispute. This was objected to, upon the ground that the testimony was closed, and that it was not competent to thus explain the record. The objection was overruled, and the testimony received. In this ruling we see no such error as to justify a reversal of the cause. The time of receiving the testimony was within the discretion of the court, and there was no abuse. The explanation was entirely competent.

Affirmed.

KIENNE V. ANDERSON, *Garnishee*.

1. RECORD: EVIDENCE. The Supreme Court will not reverse a cause upon the ground that the verdict below was not sustained by the evidence when all the evidence is not presented in the record.
2. PRACTICE IN GARNISHMENT. Under § 3270 of the Revision of 1860, if issue is not taken upon the answer of a garnishee at the same term at which it is filed, the garnishee is entitled to notice before further proceedings are had; but such notice is unnecessary where there is a voluntary appearance either in person or by attorney.

Appeal from the Dubuque District Court.

MONDAY, OCTOBER 13.

Holgren & Covell for appellant.

Burt, Angel & Lyon for appellee.

Kienne v. Anderson.

WRIGHT, J. — Plaintiff had judgment against one Jackson and garnished Anderson as the debtor of said judgment defendant. Issue was taken upon the answer of the garnishee, which was submitted to a jury, and determined in favor of plaintiff. From the bill of exceptions it appears that Jackson held a judgment against Logan & Fleming, which he authorized his attorneys to assign to Anderson in trust for certain judgment creditors of him, the said Jackson. The attorneys made the assignment, showing that it was for the benefit, among others, of the present plaintiff. A portion of this judgment was collected and paid to the trustee, for which he gave a receipt — “which receipt,” to use the language of the record, “was offered in evidence.” We find no such paper in the transcript, however. The point most relied upon for reversal is, that the evidence offered did not justify the verdict. Whether it did or not, we cannot determine, without having the testimony all before us. This is an elemental principle in an appellate tribunal, and only needs to be stated. That a portion of the testimony is omitted, and especially a paper of such manifest importance as this receipt, precludes the examination of the point made.

It is urged, however, that a new trial should have been granted, because defendant's attorney neglected his defense and he (defendant) did not know that issue had been taken on his answer.

Our opinion is, that under § 3270, of Revision, where the issue is not taken upon an answer at the same term it is filed, the garnishee is entitled to notice. But such notice is unnecessary where he makes a voluntary appearance in person, or by attorney. The record shows that in this case the garnishee did appear by attorney at the time of trial. That this attorney neglected the defense, so far as to justify the court in setting aside the verdict and granting a new trial, there is no showing whatever. We have only to add

Pelton v. Prescott.

that while it is not improbable that this judgment may work a hardship to appellant, we cannot disturb it without violating what we regard as well-settled principles.

Affirmed.

PELTON v. PRESCOTT *et al*

1. PROMISSORY NOTE: ALTERATION: SECURITY. A new consideration is not essential to support an assent by a security to an alteration in the date and amount of a promissory note, whether such an assent be expressed, either before or after the alteration is actually made.

Appeal from Clayton District Court.

MONDAY, OCTOBER 13.

FOR the facts, see the opinion.

J. O. Crosby for the appellant.

1. The alterations of the note by Pelton, by adding the sum of \$68, and changing the date without the knowledge or consent of appellant, not only rendered the note void, but completely extinguished the consideration for which it was given. *Newell v. Mayberry*, 3 Leigh, 250; *Wheelock v. Freeman*, 13 Pick., 165; *Mills v. Starr*, 2 Bailey, 359; *Whitman v. Fry*, 10 Miss., 348; *Stevens v. Graham*, 7 Serg. & Rawle, 505; *U. S. Bank v. Russell*, 3 Yeates, 391; 19 Johnson, 391; 17 Wend., 238; 24 Id., 374; 2 N. H., 543; *Master v. Miller*, 1 Smith's L. C., 458; *Bank of Limestone v. Penick*, 5 Monr., 31; Chitty on Bills, 204.

2. Appellant being surety, the note was his undertaking to answer for the debt or default of another. After plain-

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tiff had made the note void by altering it, any subsequent assent would be a new and different contract, and must not only have a consideration to support it, but being within the statute of frauds, must be in writing. Code, § 4007, sub. 3; *Cockshot v. Bennett*, 2 Term R., 763; *Payne v. Eden*, 3 Caines, 213; *Choffee v. Thomas*, 7 Cow., 358.

Noble & Beckwith for the appellee.

The only question raised by the record is, whether the alteration of a note without the knowledge of the maker at the time of the alteration, wholly vitiates the note. There is no case which goes to the extent claimed by the appellants. Chit. Bills, 207; 1 G. Greene, 74, 157, 167; *May v. Deavor*, 1 Iowa, 121; *Conrad & Co. v. Baldwin*, 3 Iowa, 207; *Fruher v. Geeseker*, 5 Iowa, 472; *Spere v. Fortner*, 6 Id., 553.

WRIGHT, J. — To the plaintiff's petition, which is upon a promissory note, one of the defendants answered, that since the signing of the same, it had been altered without his knowledge or consent, as follows: the date from December 20, 1855, to February 20, 1856, and the amount from \$400 to \$468. On the trial, it was shown that these alterations had been made by plaintiff, after the execution and delivery of the note without defendant's knowledge, who signed the same as surety. An instruction was asked to the effect, that if the note was signed by the defendant as surety, and if after this, the payee altered the same in the particulars above specified, without the surety's knowledge, then the surety was discharged, although he afterwards assented, unless such subsequent assent was founded upon some new condition. This was refused, and the refusal is now assigned as error.

The record does not profess to disclose all the testimony,

and we are simply asked to determine whether a new consideration was necessary to support the subsequent assent of the surety to the alterations shown to have been made by the payee in the note. And this point we think was ruled correctly by the court below. If the alterations had been made with his knowledge and consent, it is very clear that the note would not have been void. (*Grimstead v. Briggs*, 4 Iowa, 559.) Nor is the rule different where the assent is subsequently given. Thus, suppose the alteration is made to correct a mistake, (*Chitty on Bills*, 207,) no new consideration is necessary to support the assent afterwards given. And for anything that appears, these changes were made between the payee and the principal to correct a mistake, all of which was subsequently ratified and concurred in by the surety. What would amount to a ratification is another question, not now presented for our consideration. It did arise in *Sands v. The People*, 3 Gil., 327; cited by appellants, but that case has no application in this. And so we may remark that *Wheelock v. Freeman*, 13 Pick., 165, decides nothing bearing upon this question. There the only point was whether the cutting off the memorandum attached to the notes by payee, was a material alteration. In this case, the materiality of the alterations is not denied. And the same remark in substance applies to *Woodworth v. Bank of America*, 19 John., 391. For there, as applicable, ever so remotely to the point under discussion, it is only decided that every alteration of a note by the maker, in respect to the place of payment, or any alteration of the contract of the indorser, in a part which may in any event become material without his consent, discharges his liability. But the instruction in this case implies assent. Nor do the cases of *Newell v. Mayberry*, 2 Leigh, 250; *Mills v. Starr*, 2 Bailey, 359; *Stevens v. Graham*, 7 S. & R., 508; *Bowers v. Jewell*, 2 N. H., 543, have any greater pertinency to the question here involved. Upon this point,

 Noyes v. Horr.

however, see *Speake v. United States*, 9 Cranch, 98; *Wooley v. Constant*, 4 John., 54; *Kirwin's Case*, 8 Cow., 113.

Affirmed.

13	570
118	472

NOYES, Administrator, v. HERR *et al.*

1. RECORD: MISTAKE. When the Register in recording a mortgage, which conveyed two tracts of land, entered in the column for descriptions, in the index book, a description of but *one* of them, it was held:—

1. That the record was not constructive notice to subsequent purchasers or incumbrancers as to the tract the description of which was omitted: following *Scoles v. Wiltsey*, 11 Iowa, 261.

2. That the consequences of the omission of the Recorder to correctly describe the property conveyed fall upon the first mortgagee and not upon subsequent incumbrancers, following *Bradford v. Miller et al.*, 12 Iowa, 14.

Appeal from Dubuque District Court.

MONDAY, OCTOBER 13.

THE statement of facts will be found in the opinion.

H. H. Dillon for the appellant, relied upon *Sanger v. Crague*, 10 Verm., 555; *Jennings v. Wood*, 20 Ohio, 266; 6 Bac. Abr., 337; *Rogers v. Adams*, 8 Verm., 172; *Scoles v. Wiltsey*, 11 Iowa, 261.

D. N. Cooley for the appellee, relied upon 1 Rand., 102; 2 Greenl. Cr., 546; 14 Verm., 14, and the authorities there cited.

LOWE, J.—The case involves the following questions under the Registry Act of the Code of 1851. The plaintiff's mortgage was upon two distinct tracts of land, part of

W. half of the S. E. fractional quarter of section 35, Township 90, Range 2 E., and Lot 1, being the East half of the same quarter section. The Register, in recording this mortgage, omitted in the index or entry-book to give any description whatever of the last of these two tracts while he did describe in the column set apart for that purpose, the first in the manner above set forth. Two of the defendants, Dillon and Snivley, were junior mortgagees upon the last tract. They filed their answers in the nature of a cross-bill, setting up their claims under their respective mortgages, denying that plaintiff's mortgage had been legally or sufficiently recorded, to impart to them any constructive notice, and also denying any actual notice of the plaintiff's mortgage lien.

The court, however, held in favor of plaintiff's priority of lien to both tracts, and rendered a judgment of foreclosure accordingly.

Upon the foregoing facts two questions are prescribed. First. Did the plaintiff's mortgage, as indexed and recorded impart constructive notice to subsequent purchasers or incumbrancers, as respects the tract of land last described? If not, upon which of the parties must the consequences of such misprison on the part of the recorder fall?

In regard to the first of these questions, we are inclined to give a negative answer. Finding one tract of land duly described in the general index, and *that* not answering to the one which the searcher for incumbrances was investigating, and there being nothing to indicate that there was a second tract included in the same mortgage, or no other note or memorandum that would put a reasonably cautious person upon inquiry, we think the case falls fairly within the principle and reasoning of the rule established in the case of *Scoles v. Wiltsey, et al.*, 11 Iowa, 261.

As respects the second question, we decide that also

Betts v. Farrell.

against the plaintiff, upon the authority of the case of *Miller v. Bradford et al.*, 12 Iowa, 14.

The judgment below will be reversed, and the cause remanded.

Reversed.

BETTS V. FARRELL.

1. QUESTIONS NOT RAISED BELOW. The Supreme Court will not consider questions not raised in, and passed upon by, the court below.

Appeal from Winneshiek District Court.

MONDAY, OCTOBER 13.

S. A. Tupper for appellant.

E. E. Cooley for appellee.

LOWE, J.—Trespass for entering and breaking the close of plaintiff. Trial before a magistrate, and judgment for plaintiff—appeal to the District Court, and second judgment for plaintiff—no exceptions whatever taken to any ruling of the court.

In this court, the defendant assigns for error, for the first time, that the plaintiff was permitted to amend his petition in the District Court—claiming in argument that such amendment had the effect to change the cause of action. A comparison of the two petitions shows that such is not the fact. They are substantially the same, the last being a little more specific than the first. Besides, no objection was made to such amendment at the time—the defendant went to trial on the issues as made. He cannot raise the objection for the first time in this court.

Affirmed.

GRAVES & CO. V. ALDEN *et al.*

1. **VERIFIED ANSWER IN CHANCERY.** A sworn answer in chancery denying the allegations of the petition, places the *onus* of supporting such allegations upon the complainant; but the old rule requiring the evidence of two witnesses, or of one witness and strong corroborating circumstances to sustain allegations on which issue is thus joined does not obtain under the system of procedure in this State.
2. **ASSIGNMENT FOR BENEFIT OF CREDITORS.** To render a transfer of property void on the ground that it is a general assignment in which creditors are preferred, it must appear that the transfer was made with an intent to give a preference to creditors, and in view of insolvency.
3. **SAME: EVIDENCE.** The sufficiency of evidence to show a general assignment invalid as preferring creditors considered and determined.

Appeal from Dubuque City Court.

MONDAY, OCTOBER 13.

FOR the facts see the opinion.

Mills & Son for appellants.*E. McCeney* for appellees.

LOWE, J.—A chancery proceeding in which a decree was rendered for plaintiffs, and defendants appealed.

In April, 1860, N. L. Alden and one Isaac Blanchard formed a limited partnership in the boot and shoe business in the city of Dubuque, under the name of N. L. Alden, the general and business partner. Afterwards, stock to the amount of four or five thousand dollars, was purchased of Isaac Alden, of Stoughton, Mass., for which notes were given by N. L. Alden. This amount was reduced by payments to \$3,051.92, when the notes were assigned to Bradford Blanchard. In September, 1861, the said Blanchard went to Dubuque, to collect the amount due on said notes. Finding the firm unable to pay, he spoke of attaching their stock of goods, but was persuaded to accept the

goods at private sale for his claim, at invoice prices. On taking an account of the goods on hand, the invoice amounted to \$3,425.90, being \$377.98 more than the said Blanchard's claim. This excess was paid to the firm in cash, and their notes delivered up. Blanchard placed the goods in the possession of the said N. L. Alden, to act as his agent in the sale of the same.

After this, in January, 1862, the plaintiff in this suit obtained a judgment at law against said firm for \$157.00. An execution being returned *nulla bona* on said judgment, the plaintiffs commenced this suit in chancery to set aside the sale of goods from the firm aforesaid to the said Blanchard, and to subject the same to the payment of their judgment, upon the alleged ground that the firm was insolvent or contemplated insolvency, and had made this sale of their stock of goods with intent of giving a preference to the said Blanchard over other creditors of such partnership. There is no question, if this charge is true in fact, but that the sale aforesaid, under section 1893 of the Revision of 1860, is vitiated, and should be set aside. The only point of controversy, therefore, is, whether in the condition of the pleadings and the evidence submitted, we are authorized to say that the above allegation is true.

The petition is verified and calls for sworn answers, which were made, denying most pointedly that the sale to Blanchard was made to give a preference to him over the plaintiffs or other creditors, but that it was made in good faith to pay a firm debt, and not a debt existing against N. L. Alden, as an individual. The defendant, Alden, denies that he was totally insolvent, or that the firm contemplated insolvency. The defendant Blanchard denies all knowledge of such insolvency, or contemplation of insolvency, and claims to have acted in entire good faith, and allowed a full equivalent for said goods.

Under our changed or new system of procedure, the rule which requires two witnesses or one witness and strong corroborating circumstances to overcome a verified answer in chancery, is not recognized and does not now obtain, and although such proof is not required to be greater on the side of the adverse party in consequence of the verifications of the answers, still the denials which they contain do throw upon the plaintiffs the *onus* of sustaining by competent proof the material charges which constitute the basis of his prayer for relief. In this we think he has failed. The only evidence offered is the deposition of the defendant, N. L. Alden.

He may be considered as having proved his own insolvency, and perhaps that of the firm, especially when taken in connection with the return on the execution,—“no property found.” But aside from this, he testifies to no fact or circumstance even tending to show that the sale of these goods to Blanchard was made with the intent of giving a preference to him over the other creditors of the partnership. It is no less important to prove this allegation than that of insolvency. The two things must concur in order to contravene the policy of the statute on this subject, and obtain the relief sought.

So far as the evidence shows, there were no creditors, except the plaintiffs in this case, and the defendant, Blanchard. The goods sold for more than enough to liquidate both claims. There was, therefore, the absence of all motive to do what the plaintiffs charge in their bill they did do. At all events, to prove simply a sale and insolvency, without more, will not entitle the plaintiffs to the relief asked. There must be some evidence to indicate to the mind of the court that the parties intended to interfere with the rights of other creditors.

We think that, in hearing the cause upon the pleadings and evidence submitted, the plaintiff's bill should have

Wadsworth & Wells v. Cheeney & Stinson.

been dismissed, at their costs. Such an order will now be made in this court.

Reversed.

WADSWORTH & WELLS v. CHEENEY & STINSON.

1. **AMENDMENT: ATTACHMENT.** A petition or affidavit for an attachment may be amended and after amendment the plaintiff is not prejudiced by the defect corrected; neither is it necessary to issue and levy a new writ upon the property attached.
2. **WRIT OF ATTACHMENT.** It is not necessary in a writ of attachment to recite the cause set out in the petition.

Appeal from Floyd District Court.

MONDAY, OCTOBER 13.

THIS cause was before this court at the December term, 1859. A statement of the case is given by the court: see the opinion as reported in 10 Iowa, 258.

Upon the reversal of the judgment, a *procedendo* issued, and when the cause was again docketed for trial, the defendant moved to discontinue; pending which motion an amended petition was filed. The motion to discontinue, as well as a motion to strike the amended petition from the files, were each overruled. A motion to quash the attachment, and a demurrer to the amended petition, were each sustained. Judgment for defendant—plaintiff appeals.

C. C. Nourse and G. G. & R. G. Reineger for the appellants.

1. That the writ does not recite the grounds of attachment is immaterial. *Hays & Blanchard v. Gorly*, 3 Iowa

203. 2. An amendment of the affidavit for the attachment cures the defect, without prejudice to the plaintiff. *Graves v. Cole*, 1 G. Greene, 405; *McCarn v. Scott et al.*, 7 Iowa, 404; Code of 1851, § 2511; *Bebb v. Preston*, 3 Iowa, 325; *Harkins v. Edwards & Turner*, 1 Iowa, 296. 3. Under the old practice, the affidavit was sufficient. *Pitkins v. Boyd*, 2 G. Greene, 255; *Chittenden & Co. v. Hobbs et al.*, 9 Iowa, 417; *Bates v. Robinson*, 8 Iowa, 318. 4. None of the causes of demurrer assigned relate to the sufficiency in law of a single allegation in the answer. Code of 1851, § 1734; *Hunt v. Collins*, 4 Iowa, 56; *Holloway v. Herryford*, 9 Iowa, 356.

S. B. Starr and *L. L. Ainsworth* for the appellee, contended that an amendment substituting a new cause for attachment cannot be allowed. *Eads v. Pitkin*, 3 G. Greene, 77; *Tiffany v. Glover*, Id., 387; *Queen v. Griffith et al.*, 4 Id., 113; *Dawson v. Jewett*, Id., 157; *Wadsworth & Wells v. Cheeney & Stinson*, 10 Iowa, 258.

BALDWIN, C. J. — The action of the District Court in overruling the defendants' motion to discontinue, and to strike the amended petition from the files is not appealed from. This ruling is not assigned as error. It is useless to consider the argument of the defendants against the correctness of this ruling, as long as they resist a reversal of the cause.

The errors assigned relate to the motion to dissolve, and the demurrer to the amended petition.

If the attachment cannot be sustained, the whole proceedings of the plaintiffs' fall to the ground. When the original petition was filed the debt was not due, and the plaintiffs' action could be maintained only under the provision of the statute, which authorizes the issuance of a writ of attachment upon a debt not due.

The judgment of the District Court, upon the former appeal, was reversed and remanded for further proceedings, upon the ground that the allegations in the amended petition were in the present tense, and did not relate back to the state of facts existing at the commencement of the suit.

An amended petition was filed after the cause was remanded, obviating this defect. The court overruled a motion to strike this amended petition from the files. This action of the court was not appealed from, and it is not now a question for us to determine whether this amendment could be made or not at that stage of the proceedings.

The first cause assigned in the motion to quash the attachment is, that the writ does not recite the causes alleged in the plaintiffs' amended petition, as a ground for issuing the same. There can be no question as to the right of the plaintiff to amend his petition, or the affidavit upon which the attachment is based, upon such terms as the court may impose, and in case of such amendment, the party shall not be prejudiced by such defect. See § 2511, Code; *McCarn v. Scott et al.*, 7 Iowa, 404.

In the original and amended petition the causes for the attachment were the same, to wit: the fraudulent disposal of the defendants' property. The original petition was defective, in not stating that the debt was not due. By the amended petition this defect was cured. The plaintiff, by this amended pleading, did not withdraw the original cause of action, and allege a new and distinct one. There was, therefore, no occasion for the issuance of a new writ. The property was held under the old writ until released by the proper order of the court.

But in addition to this view of the case, we think the attachment should not be dissolved on this account, because it is not necessary, under the ruling of this court, that the causes for the issuance of the attachment should be stated in the writ. See *Hays & Blanchard v. Gorly*, 3 Iowa, 203.

There are several other causes assigned in the motion to quash ; but they present no such objections as would justify the court in its ruling.

It is claimed under the demurrer that the amended petition is inconsistent with the original one. The same objections are in substance made by the demurrer as under the motion to quash, neither of which should have been sustained.

Reversed.

LARSON V. REYNOLDS & PACKARD.

13	579
118	196

1. CONVEYANCE OF HOMESTEAD. A conveyance of the homestead by the husband without the concurrence of the wife is void.
2. SAME: DEATH OF THE WIFE. When the husband executed a mortgage, conveying the homestead, without the concurrence of the wife, and the wife subsequently died, after which the husband was again married ; and after the second marriage, the husband permitted a decree to be entered by default, foreclosing the mortgage, in an action to which the second wife was not made a party, it was held :
 1. That the conveyance made by the husband without the concurrence of the first wife was invalid, and did not operate to preclude the right of homestead in the second wife.
 2. That the decree was conclusive as to the husband, but did not bind the second wife, for the reason that she was not a party to the proceeding.
3. SAME: WIFE A PARTY. While the wife is not a *necessary* party to proceedings relating to the homestead, she will not, when not made a party, be estopped by a decree foreclosing a mortgage thereof executed by the husband alone, neither can she be ousted from the possession by a sale made under such a decree.

Larson v. Reynolds & Packard.

Appeal from Winnesheik District Court.

TUESDAY, OCTOBER 14.

ON the 25th of September, 1856, the complainant was seised in fee of the N. W. quarter of the N. E. quarter of section 9, township 98, range 7, and occupied the same as a homestead, with his wife and children. On that day, he bought of one Dow, certain other real estate, and to secure the purchase money, made a mortgage upon the property so purchased, together with other land, including the said homestead. This mortgage was signed by complainant, but not by his wife. Dow sold the mortgage to Packard, who commenced his action to foreclose the same on the 19th of September, 1859. The notice was served by copy left with a member of complainant's family, &c. A decree of foreclosure was entered by default, in October, 1859. A special execution issued, November 22, 1859, and thereunder, on the 31st of December, all the mortgaged property was sold to Packard, and a deed made by the sheriff accordingly. May 19th, 1860, Packard sold and conveyed a portion of the land, including the homestead tract to Reynolds, who, on January 4, 1861, notified complainant to leave the premises so purchased. The wife of complainant died after the making of said mortgage, and before the institution of the foreclosure suit. He married again, at what time is not clearly shown, but probably some time in the year 1857. To restrain Reynolds from proceeding with his action of right, this bill was filed, an injunction obtained, and, on the final hearing, the same made perpetual, the sale by the sheriff, and all titles thereunder set aside, from which respondent (Reynolds) appeals.

Clark & Clark for appellant.

L. W. Griswold for appellee.

WRIGHT, J. — Various grounds are set out in the bill for setting aside the decree of foreclosure, the sheriff's sale, the deed from Packard to Reynolds, and protecting complainant in his homestead, and title to all the land sold by the sheriff, but it is manifest, and substantially admitted in the argument, that in the court below the decision turned upon a construction of the homestead statute, as applied to the actual facts and circumstances of the case. And this might well be so, for, as against Reynolds, neither defects in the petition for foreclosure, variance between the notice and petition, the supposed blending therein of law and equity jurisdiction, the fact that the decree was drawn up by petitioner's attorney, that it was not signed by the judge, that the sheriff's deed to Packard was insufficient in its recitals, that the premises were sold for \$362, when worth from \$1,200 to \$2,000, nor all of them combined, would be sufficient to defeat his title. The cardinal question is, (and it is to reach this point, that the petition is, for the most part, drawn,) whether the sale of the homestead is void, or whether, under the circumstances disclosed, Reynolds acquired any title thereto, as against the mortgagor.

The statute expressly enacts that a conveyance of the homestead is of no validity, unless the husband and wife concur in, and sign the same. (Code, 1247, Revision 2279.) And that a conveyance by mortgage signed by the husband alone, under such a statute, is invalid. See the following cases: *Alley v. Bay*, 9 Iowa, 509; *Yost v. Devault*, Id., 60; *Williams v. Swetland*, 10 Id., 51; *Dorsey v. McFarland*, 7 Cal., 342; *Richards v. Chase*, 2 Gray, 1; *Williams v. Starr*, 5 Wis., 534.

But these questions remain. What effect does the subsequent death of the wife have? How far is complainant concluded by the foreclosure proceedings? Does his subsequent marriage before the foreclosure affect the question?

If complainant's present wife had been made a party to the bill to foreclose, we think the controversy would have been at an end. A failure to set up the homestead exemption at that time would have concluded and estopped them from making the claim against one holding under the sale. The order of foreclosure would have settled the homestead right, and in an action for the possession, it could not be again adjudicated. This seems to us to be in accordance with familiar and well settled law, as applied to analogous questions, and is sustained by the following direct adjudications. *Lee v. Kingsley*, 13 Tex., 68; *Tadlock v. Eccles*, 20 Id., 782. Where there is personal service, and a party from his own fault, fails to make his defense, he is as much concluded, as if the question had been expressly determined.

And so, again, if complainant had not been married at the time of the foreclosure, he could not now raise the question. For, if unmarried, he was the only person who could defend, or insist upon the homestead right. And though the mortgage was invalid for want of the wife's signature, yet he might or not insist upon such invalidity. It is as if he had been sued upon a note declared void by statute, or one that he had fully paid, or one obtained by fraud, and had failed after personal service, to make his defense. In such a case, the judgment concludes him of course, and we see no reason why the same rule does not apply in the present instance.

The mortgage being invalid at the time of its execution the subsequent death of the wife would not change its character. If her right therein had been a mere dower interest, the deed without her signature would have been good to the extent of his right, and her death would have put an end to any claim of dower. But the right of the wife to the homestead differs from that of dower, and the provisions of the statute as to its conveyance or incumbrance

Larson v. Reynolds & Packard.

are also different. It is not different from dower in such a sense that a similar deed will not convey the one as well as the other. But the difference arises necessarily from the rights and privileges reserved to the wife during and after the life of the husband. Thus the husband may fail to select, plat, mark out and record the homestead, and if so, the privilege then devolves upon the wife. So as we have already seen, the deed passes nothing, not even his interest, if she does not join. Upon his death she has a right to continue in its occupation, and it cannot be taken from her by his will or device. And if she does not survive the husband, her issue may, upon a certain contingency, take the whole homestead. From which premises it is reasonably clear that the wife's right or interest in the homestead is not merely an inchoate one, to become vested after his death, and after assignment, that may be disposed of by a judicial sale for the debt of the husband; but that the occupation of it as a home gives her a right therein, without any further act on her part, or any one for her, which cannot, without her consent, be divested. The homestead belongs as it were to the family. It is for the benefit of the family — parents and children. As to its conveyance, the law contemplates that there shall be a concurrence of both minds, (of the two heads, so to speak,) before the dwelling-place of the family shall be encumbered, or the right of either one be divested or affected. It is seen, therefore, that the will of the wife is, in theory, as supreme as that of the husband. And in perfect consonance with these views, is the case of *Revalk v. Kraemer*, 8 Cal., 66; and *Id.*, 76, where it was held that a mortgage upon a homestead, which was void because executed by the husband alone, is not rendered valid by the subsequent death of the wife. In such a case, the debt remains good, and the property, if liable, becomes so just as if the mortgage never existed. The case of *Ties v. De Diabler*, 12 Cal.,

327, recognizes somewhat the same principle, for it is there held that the exemption is as much for the benefit of the children as the wife, and therefore, where, after the elopement and adultery of the wife, the husband mortgaged the homestead, the mortgage was held inoperative and void.

The mortgage was invalid then, when made. If complainant had not been married at the time of the foreclosure, or if the present wife had been made a defendant in that action, the homestead exemption could not now be set up. It then remains to inquire what effect shall his subsequent marriage and the non joinder of the wife have upon respondent's title.

The necessity of making the wife a party, or allowing her to intervene in an action affecting the homestead, is not very clearly settled by the authorities. In California and Texas, (in which states, by the way, more important questions touching the homestead right have been settled than in any others,) it is held that husband and wife should be joined; that if, on foreclosure, she is not joined, her rights are not affected, and that it is error to refuse to allow her to intervene. (*Sargent v. Wilson*, 5 Cal., 504; *Tadlock v. Eccles*, 20 Tex., 782; *Revalk v. Kraemer*, 8 Cal., 66; *Cook v. Klink*, Id., 347. And see *Wesnier v. Farnham*, 2 Mich., 472.) The cases in 8 Cal., hold that if the husband alone is made a party and defends, his rights are not concluded by the decree, and he may, notwithstanding, join with his wife in a bill to restrain the carrying of the decree into effect.

In our own state, the question has undergone some discussion. *Sloan v. Coolbaugh*, 10 Iowa, 31, was a bill in equity by the husband to restrain a sale under a mortgage with power of sale, (the mortgage being signed by the husband and wife,) and it was there held that the wife was not a necessary party. In *Helpenstein & Gore v. Cave*, 3 Iowa, 287; the plaintiffs brought ejectment, and the husband set up the homestead claim. During the progress of the

cause the wife asked to be made a party, and set up a claim to the homestead as existing in herself as a wife, independently of what her husband had done or omitted to do. The question arose under the act of 1849, ch. 124, and it was held that she should not have been allowed to intervene. In discussing the point, WOODWARD, J., uses this language: "If she has rights which she may assert separately from her husband, they cannot be such, at the best, as to exonerate her from doing that which her husband was to do, that which the law required. She must at least show that she has done that which her husband was required, but omitted to do. She must take the ground that what he has omitted she has done; or that as he refuses or neglects to make defense, she should be permitted to do so. Something like this must be her position. There is no new, different, or independent basis of right or law for her to found her claim upon. The statute is very meagre and deficient upon the matters above alluded to, it must be admitted; but there is room to doubt whether it intended to confer upon the wife the right here claimed, which is an *independent* right. The utmost that could, in any view of it be accorded to her, would be to defend if he did not, or possibly, to show that she had supplied his omission by doing some act which he had neglected. But if she cannot assume one or the other of these grounds, there does not appear any reason for her becoming a party."

"We are not inclined," he continues, "to settle the question definitely, as to her becoming a party under the above circumstances, since the cause does not demand it; but it seems apparent, that without assuming some such positions as those above indicated, there is no call or occasion for letting her in. Of what benefit would it be? What would she gain, or what can she do? What is her position, as she asks admission now? The husband appears and defends, and she does not pretend the contrary. She does

not claim that he has refused or neglected to do some necessary act, which she has supplied. She simply sets up a right to the homestead, as the wife of the defendant, and as the mother of a family, without reference to what her husband has done or omitted to do. This claim of right we cannot recognize, and, therefore, it is our opinion that the court erred in permitting her to come in as a party defendant."

Following what we believe to be the spirit of our statute, and especially after the construction given to it by these cases, we are inclined to the opinion and so hold, that the wife is not a *necessary* party to *every* action which may affect the homestead. If she is a party to the mortgage foreclosed, then of course, if not a party to the foreclosure, she would not be concluded by anything done. In that case, however, it would by no means follow that the husband, if a party, would not be estopped, though the wife might not be. The cases in California (8th, 66, 347,) go much beyond what we regard the correct rule under our statute, in holding that if the husband alone is made a party, and defends, *his* rights are not concluded. He might, it is true, join with the wife in a bill to restrain proceedings under such a decree, but this, as it seems to us, upon the ground of protecting her rights, and not because there was any right of his left for adjudication. In other words, as he could, if sued alone, set up the exemption, he could not, after decree upon that question, still insist, for himself, upon the same claim.

But assuming that she is not a *necessary* party, and that there has been a foreclosure of a mortgage which she did not sign, does it follow that the decree to which she is not a party estops either or both of them from claiming the exemption. Or take the very facts of this case. When the complainant married, in 1857, there was no valid incumbrance upon his homestead. His present wife, therefore,

acquired the same right and interest therein, as though the mortgage under which respondent claims had not been made. The invalidity was such as to effect it in the hands of any third person. And therefore, while she is not a *necessary* party, in all cases affecting the homestead (as in *Sloan v. Coolbaugh*, 10 Iowa, 31, or in ejectment, under ordinary circumstances, brought by or against the husband,) yet, in this instance, before she could be concluded and ejected from the possession of the homestead, which was never validly incumbered, she should have been made a party, and while the decree would be good, as against the husband, it would not as to her. Not being good as to her, and as her right to the possession of the homestead cannot be disturbed by the sole action of the husband, (we speak here of the general rule, and not of the exceptions contemplated by § 1249, and other parts of the Code,) ejectment would not lie to dispossess herself and family, as well as the husband, — for their possession is the same, and if one cannot be dispossessed, neither can the other, according to the theory and policy of our law.

Under the testimony, it is impossible to ascertain how much was bid for the homestead, and how much for the other mortgaged property. The sale should, therefore, be set aside, and a new one ordered, so much of the decree, however, as sets aside the entire order of foreclosure is reversed. It is good, as against the husband, as to the amount found to be due, and also, so far as it forecloses his interest in the mortgaged premises. The cause will be reversed and remanded, with instructions to proceed in a manner not inconsistent with this opinion.

Reversed.

Warren v. Chickasaw County.

WARREN V. CHICKASAW COUNTY.

1. ALTERATION: BURDEN OF PROOF. When the execution of a county order is not denied under oath the burden of showing that it was altered after execution is upon the maker.

Appeal from Chickasaw District Court.

TUESDAY, OCTOBER 14.

THE facts are stated in the opinion of the court.

L. L. Ainsworth for the appellant, cited *Smith's L. C.*, 811; *Haines v. De Witt*, 11 N. H., 181; 3 Barb. S. C. R., 374.

A. G. Case for the appellee, cited *Grimsted v. Biggs*, 4 Iowa, 559; *Jones v. Ireland*, Id., 63; *Ault v. Fleming*, 7 Id., 143.

BALDWIN, C. J. — This suit is upon a warrant issued by Lorenzo Bailey, as the County Judge of Chickasaw county, payable to one Helm or bearer.

The cause was submitted to the court. Upon the trial the plaintiff offered in evidence the said warrant, to the introduction of which the defendant objected, claiming that the words "or bearer" had been inserted therein without the knowledge or consent of the defendant.

Evidence was introduced by defendant tending to show that the words "or bearer" were not in the warrant after the same had been issued. It appeared, however, that these words were inserted by the said Bailey, but that he, as County Judge, made no record of the order in reference to such change.

The execution of the warrant was not denied under oath. It was therefore upon the defendant to show to the satisfaction of the court that this alteration was made without the knowledge or consent of the county.

13	588
81	97
13	588
88	681

Ryan & Louthan v. Chew.

Taking into consideration the fact that the defendant did not deny under oath the execution of the warrant, in connection with the fact that the whole of the warrant was in the handwriting of the said Bailey, we do not feel authorized to say that the court erred in the admission of the warrant in evidence.

Affirmed.

RYAN & LOUTHAN v. CHEW.

1. **PROMISSORY NOTE TRANSFERRED AS COLLATERAL SECURITY.** The assignee of a note transferred before maturity, as collateral security for a pre-existing debt, without any new consideration, is not a holder for value, in the usual course of trade, following *The Trustees of Iowa College v. Hill*, 12 Iowa, 462.
2. **SET-OFF AGAINST A PROMISSORY NOTE.** Equities between the parties to a promissory note when arising from transactions independent of the note is not available against it in the hands of an assignee, following *Shipman v. Robbins*, 10 Iowa, 208, and *Denton v. Lewis*, *ante*.

Appeal from Dubuque District Court.

TUESDAY, OCTOBER 14.

THIS action was brought upon a negotiable promissory note, made by the defendant to one Thomas Smith, and by him transferred before maturity to the plaintiffs. The defendant claims a set-off of a balance of an account due from Smith at the time of the transfer of the note. The cause was submitted to the court, which found specially that "the plaintiffs were not *bona fide* holders and owners of the note sued, but that the said note was transferred to them by the payee as collateral security for a pre-existing indebtedness." Judgment was rendered for plaintiff, after deducting the set-off, and from this they appeal.

13	589
89	461
13	589
106	641
13	589
109	666

Ryan & Louthan v. Chew.

Wilson, Uiley & Doud for the appellants, relied upon *Swift v. Tyson*, 16 Pet., 1, 15; *Townsley v. Sumrall*, 2 Pet., 170; note, § 195 of Story; *Parsons Mer. L. Ch.*, 9, § 5, and note 5; *Atwood v. Crowdie*, 1 Stark, 481; *Lathrop v. Morris*, 7 Sand., 7; *Ould v. Harrison*, 28 Eng. L. & E. R., 524.

Wiltse & Blatchley for the appellee, cited 10 N. H., 266; 20 John., 637; 6 Hill, 93; 11 L. & R., 377; 6 Whart., 220; 31 Maine, 205; 2 Gratt., 262; 1 Humph., 470; 1 Wood. & Min., 287; *Trustees of Iowa College v. Hill*, 12 Iowa, 462.

BALDWIN, C. J.—The finding of the court below that the note sued on was transferred to plaintiff by the payee thereof, as collateral security for a pre-existing indebtedness, and that the plaintiffs were not, therefore, *bona fide* holders thereof, is fully supported by the evidence.

It is, however, claimed by counsel for the appellants, that, even though the plaintiffs should hold the note as collateral security they would, nevertheless, be *bona fide* owners and holders, and the set-off would not be admissible.

It appears from the evidence that the note was made by defendant, Chew, and delivered to one Perry, a hired man, and applied in payment of wages due from Chew. The note was, at the request of Perry, made directly to Smith, in payment of a horse purchased by Perry of Smith.

The question as to whether a party who takes a negotiable note before maturity as collateral security for a pre-existing debt, is under the commercial law a *bona fide* holder, and is to be protected against any equities of the maker, seems to have often been presented to the courts for determination, but the rulings thereon are by no means uniform. This court, however, in the case of *The Trustees of Iowa College v. Hill*, 12 Iowa, 462, adopted the conclusion of the

court in the case of *Roxborough v. Messick*, 6 Ohio St. R., 448, which held that "if the note is transferred as collateral security to a pre-existing debt without consideration, so that the transfer is a mere voluntary act on the part of the debtor, and is received by the creditor without incurring any new responsibility, parting with any right, or subjecting himself to any loss or delay, and leaving the subsisting debt precisely in the condition it was before such transfer, the holder had not taken the note for value, nor in the usual course of trade."

The question, then, arises, whether the fact that the plaintiffs are not *bona fide* holders of the note within the meaning of the commercial law, will enable the defendant to plead as a set-off the defense he had against the original payee, Smith. It has been held by this court in the case of *Shipman v. Robbins*, 10 Iowa, 208, that "equities between the parties to the note arising from other and independent transactions between them, are not available against the note in the hands of the assignee." See, also, *Denton v. Lewis*, *ante*.

The consideration for which this note was given was a separate and independent transaction from that upon which the set-off was based. Following these decisions the case must be

Reversed.

APPENDIX.

L—NOTES OF CASES NOT OTHERWISE REPORTED.

[These notes consist, in the main, of memoranda made by the Court in deciding the cases to which they relate.]

THE STATE OF IOWA V. UTLEY.

Certiorari to the Dubuque City Court—Wednesday, April 9.

CONTEMPT OF COURT.

THE decision was announced by—

LOWE, J. — The respondent was summoned before the city court of Dubuque to show cause, if any he had, why he should not be fined for contempt in disobeying the orders of said court. The showing being adjudged insufficient, he was fined \$20 and the costs of the proceeding, and thereupon the respondent transferred the same by certiorari to this court, for revision.

The record does not disclose the nature of the contempt. In other words, there is not found entered upon the records of the court a statement of the facts upon which the order was founded, as § 2694 of the Code of 1860 expressly requires, when the court acts upon its own knowledge in the premises, as it would appear he did in this case; and therefore, the order entering the fine will be reversed, upon the authority of the case of *Stiff v. The State of Iowa*, 2 Iowa, 550.

Reversed.

HURLEY v. GILCHRIST.

Appeal from Chickasaw District Court—Tuesday, April 15.

HOMESTEAD — USURY — FRAUD.

THE decision of the court was announced by—

LOWE, J.—On the 15th day of August, 1858, the plaintiff and his wife, Mary Hurley, executed and delivered to defendant a deed of trust upon certain pieces of land therein described, to secure the payment of a note of the same date calling for \$635.²³/₁₀₀, payable to William J. Gilchrist, at six months. Default being made in payment thereof, the defendant proceeded to advertise and sell the trust property, and thereupon the plaintiff applied for and obtained an injunction to restrain said sale upon charges made in his petition that the debt was usurious, that the note and deed of trust were fraudulently obtained, and without consideration to the extent of \$135.²³/₁₀₀, and lastly that the defendant was about to sell his homestead, without first exhausting his other property. These charges were severally controverted, and we think altogether successfully. The evidence was limited to the testimony of the parties to this suit, and that of William J. Gilchrist, and according to our analysis of the same, it exhibits the following state of case: On the 10th of August, 1857, the plaintiff purchased the land described in the deed of trust, from one David Ripley, for the consideration of three thousand dollars, two thousand of which was paid down, and a note of one thousand was given to said Ripley payable in one year, and received a bond from him for a title. In February following, plaintiff moved upon said land, about which time he learned that his vendor, Mr. Ripley, had purchased the same land of one Watson, who still held a legal title to a part of the land, and a claim of four or five hundred dollars due from Ripley on the purchase money. In March, 1858, Ripley being indebted also to William J. Gilchrist in the sum of \$800, proposed to said Gilchrist that if he would advance the money which he still owed Watson on the land, that he would transfer to him the one thousand dollar note which he, Ripley, held against Hurley, the plaintiff, in payment of his own debt and the money so advanced, giving his own note to the said Gilchrist for the difference, being \$235.²³/₁₀₀, payable in August following, when the thousand dollar note fell due. As a part of this arrangement, which was accordingly entered into, Ripley was to obtain a deed from Watson for the land now in controversy, and convey the same to Gilchrist as collateral security for both notes, on payment of which he was to reconvey to Hurley, or to Ripley, as the latter might direct, all of which was accordingly done.

In August, 1858, when these notes came due, Ripley appeared at McGregor, as the agent of Hurley, to make a payment on his note and to explain the reason why he was not prepared to take up the whole note. He paid \$464.77 on said Hurley's note, which was duly credited, leaving \$635. $\frac{23}{100}$, including the interest, still due. At the same time the said Ripley paid and took up his own note of \$235. $\frac{23}{100}$.

Mr. Hurley, the plaintiff, being unprepared at that time to take up the thousand dollar note, desired through his friend Ripley an extension, and it was thought best to give him six months, make him a deed at once to his land, take a new note for the \$635. $\frac{23}{100}$, secured by deed of trust on the same land, all of which was accordingly done, without objection on the part of plaintiff, and this note and deed of trust are the same now in controversy.

These facts are mainly established by the testimony of William J. and James N. Gilchrist. There is nothing in the testimony of the plaintiff, who also testified, that necessarily contradicts them. It is true he claims to have paid on said debt \$600 instead of \$464.77, but admits that he did not himself pay it, but that he gave to Ripley two drafts of three hundred dollars each, to be applied on said note. He also states that at the time he signed the note and deed of trust, Ripley promised to pay Gilchrist \$135. $\frac{23}{100}$, but there is nothing in the evidence to show that either of the Gilchrists were privy to, or had any knowledge of these facts. The tendency of plaintiff's testimony is to show, if it proves anything, that Ripley had used \$135. $\frac{23}{100}$ of his money to pay off his, Ripley's, debt to Gilchrist, and that he afterwards promised the plaintiff that he would pay the same amount for him to Gilchrist, a matter of which the Messrs. Gilchrist were not cognizant, nor to which were they a party. And this is really all of this case. There is no evidence of fraud or usury, or that any rights under the homestead law were about to be affected by the action of the defendant in the premises. The debt arose before the homestead was acquired, indeed was created in the purchase of the alleged homestead.

In this condition of the case, the court below dismissed the proceedings at the cost of the plaintiff, which decision is unhesitatingly

Affirmed.

McClintock for the appellant — *Odell* and *Updegraff* for the appellee.

CASE V. SEMPLE.

Appeal from Chickasaw District Court—Tuesday, April 15.

HUSBAND AND WIFE—JOINT DEBT.

THE decision of the court was announced by—

LOWE, J. — Husband and wife were sued on a note. Defense of the wife was that she was a *feme covert* at the time of the execution thereof. The plaintiff in reply admits the coverture, but alleges that the note was given for family expenses and necessities, and that the said Sarah expressly agreed on the face of the note that her separate property should be held for the same. The sustaining of a demurrer to this replication is the foundation of this appeal, and the matter assigned for error.

The replication was well pleaded, and comes distinctly within the purview of § 1455 of the Code, as well as the spirit and rule prescribed in the case of *Rodemeyer v. Rodman*, 5 Iowa R., 420, and the doctrine laid down in 17 How. R., 561. The order sustaining the demurrer is therefore reversed and the case remanded.

Reversed.

McClintock for the appellant — *Ainsworth* for the appellee.

KNAPP V. MILLER *et al.*

Appeal from Boone District Court—Wednesday, April 16.

EXCESSIVE JUDGMENT.

THE facts were stated and the decision announced by—

LOWE, J. — Suit on a note, which does not stipulate for any rate of interest above six per cent.

A judgment by default was rendered for \$116.27, drawing ten per cent interest. The only error which the record shows, is that the judgment was rendered for 72 cents too much, and to draw ten instead of six per cent interest. This error is confessed by appellee, who asks that the proper judgment should be rendered in this court, to wit: \$115.55, drawing six per cent from the 16th day of April, 1861—which is accordingly ordered at costs of appellee.

Phillips & Phillips for the appellant—*Hull* for the appellee.

IN THE MATTER OF THE APPLICATION OF CAROLINE HIESCHLER, &C.

Appeal from Des Moines District Court—Thursday, April 17.

SUPPORT OF WIDOW AND MINOR CHILDREN.

THE proposition of law involved in this case was stated and the decision announced by —

BALDWIN, C. J. — Where it is ascertained that an estate is insolvent, and that after the final settlement there will remain no sum whatever in the hands of the executors for the widow or children,

Held, that there is no provision of law that would justify the County Court in making an order directing the executors to pay a portion of the assets of the estate to the widow for her support and that of the minor children. Judgment

Reversed.

J. Tracy for the appellant—*Hall, Harrington & Hall* for the appellee.

MORTON & Co. v. CHASE & KING.*Appeal from Louisa District Court—Monday, June 2.*

EVIDENCE—PRESUMPTIVE.

THE facts and the conclusion of the court were stated by —

LOWE, J. — Foreclosure of a chattel mortgage against Chase and King, given on a saw-mill, two circular saws, with all the machinery, excepting engine, belting and shafting, which is attached to said machine shaft. Also, one sash-sticker thereto attached. Levi Chase is made a defendant, as setting up some claim to the property mortgaged.

He exhibits a junior mortgage upon the same mill, machine-shop and all their fixtures, including the property mortgaged to plaintiffs. He claims that the property mortgaged to plaintiffs are fixtures, and are attached to the real estate, the title of which was in him at the time his co-defendants mortgaged it to plaintiffs. But his proofs do not show this fact. He swears to it, however, in his answer, and claims that is sufficient evidence of the fact. Such an answer was not called for by the petition, and therefore is not evidence.

Levi Chase offered the deposition of his co-defendant, Joel O. Chase, which was excluded as incompetent. This is pressed as error, but it was right.

The only question of doubt in the case is, whether the sash-sticker was included in the plaintiff's mortgage, or was intended to be excepted. The court below held that it was included. As the record does not show that all the evidence is before us, we will presume that the ambiguity was cleared up by adequate testimony, and that the court decided honestly. Judgment below

Affirmed.

Levi Chase, pro se. — *Crocker & Smith* for the appellees.

WAGNER V. GALYEAR *et al.*

Appeal from Delaware District Court, Tuesday, June 3.

MORTGAGE FORECLOSURE — NO REDEMPTION.

THE decision of the court was announced by —

BALDWIN, C. J. — This was a proceeding in equity to redeem from a sale made under a decree of foreclosure of a mortgage.

Upon the authority of *Kramer v. Redman*, 9 Iowa, 114, and *Stoddard v. Hays*, decided by a majority of this court, December term, 1861, the order of the court below, giving to the complainant the right to redeem, is not authorized by the statute in force when this proceeding was commenced.

Reversed.

House, Brayton & Watson for the appellant — *Bissell, Mills & Shiras* for the appellee.

NILES & CO. V. THE CHICAGO, IOWA AND NEBRASKA RAILROAD COMPANY.

Appeal from Clinton District Court — Tuesday, June 3.

PRACTICE IN THE SUPREME COURT.

The dismissal of the appeal in this cause was announced by —

WRIGHT, J. — This cause was submitted October 22, 1861, with an agreement that appellants' argument should be filed by the first of

December, and appellees within ten days thereafter No arguments have been filed, and no further steps taken.

The same is therefore dismissed for want of prosecution.

Noyes & French for the appellant.

MYERS, Administrator, v. KENDRICK, Administrator.

Appeal from Wapello District Court—Tuesday, June 3.

CORRECTION OF JUDGMENT.

THE facts were stated and the order of the court announced by—

LOWE, J.—This cause was tried by the Judge of Probate, and also upon an appeal, by the District Court, without a jury,—in each court a judgment was rendered for plaintiff. The record before us presents legitimately no question for our determination. In trying the cause, the court found no facts, no exceptions were taken to his rulings, except the overruling of the defendant's demurrer, which was waived by his answer. No other questions were raised in the court below, so far as the record shows. It is insisted, however, that the judgment entry is wrong in form, making the individual property of the defendant liable, instead of the assets in his hands as administrator. The requisite modification will be ordered, at the cost of appellee. In other respects, the judgment below will be

Affirmed.

BRICE v. CARR *et al.*

Appeal from Linn District Court—Thursday, June 12.

NEGLECT IN PROCEEDING AGAINST A GARNISHEE DOES NOT DISCHARGE THE JUDGMENT DEFENDANT.

THE decision of the court was announced by—

WRIGHT, J. — Complainant seeks to restrain the collection of a judgment. The gravamen of the bill is, that the creditor garnished a

debtor of the defendant in execution, and held him so long under and by virtue of that process, that he, in the meantime, proved to be insolvent; that complainant thereby lost his debt, whereby he was in equity discharged from all liability on said judgment.

We think the court was justified in concluding that there was no such delay, on the part of plaintiff in the garnishee proceedings, as to entitle complainant to the relief asked. And if unnecessary delay did occur, complainant could have prevented this by paying his debt, as was his duty, and thus releasing the garnishee. This proceeding did not absolve complainant from his duty to discharge his debt. He had something to do. He could not remain passive.

Affirmed.

THE STATE OF IOWA V. BITTING.

Appeal from Polk District Court—Saturday, June 21.

DUPLICITY IN INDICTMENT.

The decision of the court was announced by —

BALDWIN, C. J. — Upon the authority of *The State v. Cooster*, 10 Iowa, 453, an indictment is not objectionable on the ground of duplicity, where the defendant is charged, in the first count, with keeping a gambling house, and in the second, with permitting other persons, in a place under his control, to play at cards, or other games, for money.

Affirmed.

S. V. White for the State—*John C. Turk* for the appellant.

LODGE V. REZKOR *et al.*

Appeal from Johnson District Court—Wednesday, June 25.

VERDICT AGAINST EVIDENCE.

After making a statement of the facts, and holding that the evidence was not sufficient to sustain the decree below—

WRIGHT, J., said: Appellees state an acknowledged general rule in this language: "That this court will only interfere with an order

granting or refusing a new trial, when it is manifest that the discretion vested in the court has been abused." There is no room for controversy as to the general rule governing such cases. Each case stands, however, upon its own circumstances, where it is claimed that the verdict is unsupported by the evidence. In any case, however, where the verdict is manifestly not sustained by the evidence, it is not only the right but the duty of this court to interfere. (25 Ill., 200.) We have frequently had occasion to discuss and pass upon our duty in this class of cases, and without referring to the numerous cases decided, we direct attention to the following, as stating, in succinct terms, the law governing the exercise of this discretion. (*Jourdan v. Reed*, 1 Iowa, 135; *Stewart v. Evobank*, 3 Id., 161; *Tomlinson v. The State*, 11 Id., 401.)

It can serve no useful purpose to refer in detail to the testimony in this case. It is, as already suggested, very voluminous, covering over one hundred pages of the transcript, is all before us, and the fact is perfectly manifest to our minds that this finding cannot be sustained, after giving every presumption in favor of its correctness.

PICKETT V. HAWES.

Appeal from Chickasaw District Court—Friday, June 20.

CHANGE OF VENUE CONDITIONAL.

At the July term of the Chickasaw District Court it was ordered "that the venue of this cause be changed to Butler county, at the cost of the defendant, on his application therefor." At the next term the cause was re-instated on motion of plaintiff:

PER CURIAM. — The order for the change of venue was not unconditional. The case, therefore, does not fall within the rule stated in *Fuller v. Furr*, 12 Iowa, 83. The condition was not complied with, and the District Court of Chickasaw county did not err, therefore, in re-docketing and trying the cause.

Re-hearing refused.

KEY V. HAYDEN *et al.*

Appeal from Washington District Court—Wednesday, June 20.

DEFAULT PENDING DEMURRER ERRONEOUS.

THE decision of the court was announced by—

WRIGHT, J. — When it appeared that on the 13th of December, 1859, one of the respondents (A. L. Burris) filed his demurrer to complainant's bill, and that afterwards, in April, 1860, a default was entered for the failure of all the respondents "to plead, answer, or demur:"

Held, That the default was improperly entered as to said demurrant, and that the decree should, as to him, be set aside. *Arbuckle v. Bowman*, 6 Iowa, 70; *Canal Bank v. Newberry*, 7 Id., 4; *B. & M. R. R. Co. v. Marchand*, 5 Id., 468. The decree is therefore affirmed as to all respondents except the said A. L. Burris, and as to him is

Reversed.

Grant & Smith for the appellant — *Hall, Harrington & Hall* for the appellee.

HAMLINE V. BECK.

Appeal from Guthrie District Court—Thursday, June 26.

NO EXCEPTIONS BELOW — INSTRUCTIONS ON EVIDENCE NOT IN THE RECORD.

THE facts and the ruling of the court thereon were announced by—

LOWE, J. — Suit on a demand against defendant on which a judgment was rendered for \$ —, and defendant appeals, assigning two errors.

1st. In overruling a motion to quash the attachment. No exception was taken to this ruling below, and cannot be considered by us.

2d. In giving a certain instruction, which was done upon the court's own motion. The instruction in question is based upon the evidence introduced in the cause, which is not certified up to us, wherefore we are without the necessary means of determining whether the court did or did not err in giving the same.

C. C. Nourse for the appellant — *McPherson & Elliott* for the appellee.

THE STATE OF IOWA V. STIEFLE.

Appeal from Des Moines District Court—Saturday, June 28.

CRIMINAL PRACTICE.

The decision of the court was announced by —

BALDWIN, C. J. — When the defendant was regularly indicted, tried and convicted of a misdemeanor, and judgment rendered thereon; held, that it is not necessary that the record should show that the defendant was asked if he had any legal cause to show why judgment should not be pronounced against him.

Affirmed.

M. D. Browning and *B. J. Hall* for the appellant—*C. C. Nourse*, Attorney General, for the State.

SWORDS V. RUSS.

Appeal from Dubuque City Court—Saturday, June 28.

PRACTICE: MOTION: DEMURRER.

The decision was announced by —

WRIGHT, J. — Demurrer to petition, for the reason that it contained more than one cause of action, stated in one and not in separate counts. If the pleading was obnoxious to the objection taken, the demurrer was, nevertheless, properly overruled. The objection taken is the ground of a motion, and not demurrer. (Rev., § 2903.)

Affirmed.

W. S. Jennings for the appellant—*Griffith & Knight* for the appellee.

HAYDEN & BUTTERWORTH V. WILTSE *et al.*

Appeal from Hamilton District Court—Saturday, June 28.

INJUNCTION—EVIDENCE OF RECORD.

THE decision of the court was announced by—

BALDWIN, C. J. — Injunction to stay sheriff's sale of real estate, under a judgment in favor of respondents.

The cause was heard upon the pleadings, and evidence introduced by both parties. We could not undertake to say that the court erred in making the injunction perpetual, unless it was made to affirmatively appear that all the evidence was before us, upon which the decree of the District Court was rendered.

Affirmed.

Hull for the appellant—*Duncombe* for the appellee.

ALLYN V. JOHNSON.

Appeal from Dubuque District Court—Friday, October 10.

THE LEGAL TITLE WILL PREVAIL AGAINST AN EQUITABLE ONE.

BALDWIN, C. J. — Upon the authority of *Page v. Cole*, 6 Iowa, 153; *Harman v. Steinman*, 9 Id., 112; *Farley, Norris & Co. v. Goocher*, 11 Id., 570, and *Abbott v. Chase*, *ante*, in an action of right the legal title will prevail against an equitable one.

The defendant by his answer admits the legal title to be in the plaintiff; but claims that the conveyance was not intended to be absolute, but as a mortgage. The demurrer to this answer, upon the foregoing authorities, should have been sustained.

Reversed.

J. B. Powers and *I. M. Preston* for the appellant—No appearance for the appellee.

SPRECHT V. SCHWER.

Appeal from Dubuque District Court—Saturday, October 11.

EXCEPTIONS—RECORD.

THE opinion of the court was delivered by —

LOWE, J. — Action in replevin for a hog, judgment for defendant, both before the justice of the peace, and in the District Court on an appeal. No exceptions taken to the action of either court.

The record shows that in the District Court the jury found for the defendant, and assessed his damages at one dollar. On this verdict, the court, on the 7th of March, 1861, rendered a judgment for the return of the property, and one dollar damages and costs. One year afterwards, it would appear from the following entry a motion of some kind was made:

“ March 1, 1861.

“ This cause coming on for hearing on motion to correct the judgment heretofore rendered in this case, and the said motion being fully heard, is overruled. — Exception.”

The motion referred to by this entry is not in the record, nor is there any bill of exceptions, that shows what the motion was.

The assignments are that the court erred in rendering a judgment for a return of the property, on the verdict of the jury; secondly, in overruling the motion to correct the judgment.

It is a sufficient answer to the first of these alleged errors that no exceptions were taken to the action of the court, at the time of rendering the judgment. To the second, that if any such motion to correct the judgment was made, it does not appear of record, and we therefore have no means of determining the action of the court upon it.

The judgment of the court below will therefore stand

Affirmed.

Burt, Angel & Lyon for the appellant — *F. Gottschalk* for the appellee.

SCHWER V. SPRECHT *et al.*

Appeal from Dubuque District Court — Saturday, October 11.

RECORD.

THE opinion of the court was delivered by —

BALDWIN, C. J. — The error complained of is the admission in evidence by the justice of the peace, from whose judgment the writ of

error was taken, a copy of the replevin bond, which appears to have been the basis of the action.

We cannot say that there was error in this action of the court. The bond or copy objected to is not sufficiently identified by the record, nor can we say but that a sufficient foundation was laid before the copy was introduced. The error must affirmatively appear before this court can reverse.

Affirmed.

Burt, Angel & Lyon for the appellant — *F. Gottschalk* for the appellee.

HARWOOD v. REINEGER *et al.*

Appeal from Floyd District Court — Monday, October 13.

CASES FOLLOWED.

THE opinion of the Court was delivered by —

WRIGHT, J. — In equity. Complainant appeals, and insists that the chancellor erred in dissolving the injunction. With the equities of the case, except so far as they are involved in this question, we have nothing to do. And following the case of *Shricker v. Field*, 9 Iowa, 366; *Anderson v. Reed*, 11 Id., 177; *Stevens v. Myers*, Id., 183; *Cassady v. Bosler*, Id., 242; and the rule there recognized, we see no reason for interfering with the discretion exercised in dissolving the injunction.

Affirmed.

Starr & Patterson for the appellant — *L. L. Ainsworth* and *W. B. Fairfield* for the appellee.

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ACCOUNT.

See COPARTNERSHIP, 5.

ACKNOWLEDGMENT.

See FRAUD, 6, 7.

ACTION AT LAW.

See EQUITY, 7; TITLE, 1.

ADMINISTRATOR.

1. **SPECIAL ADMINISTRATOR.** Under the Revised Laws of 1843, the powers of a special administrator were limited to the preservation of personal property of the decedent until a regular administrator could be appointed; and an order of the Probate Court directing the sale of real estate by a special administrator was without authority of law and was void. The regularity of such an order and the proceedings thereunder may be collaterally impeached. *Long et al. v. Burnett*, 28.
2. **APPOINTMENT OF ADMINISTRATORS.** The Probate Court may appoint one or more administrators of an estate, and an appointment of an additional administrator, against the protests of the one first appointed, will not be disturbed when it does not appear that the court has abused its discretion in making such appointment. *Read v. Howe*, 50.
3. **AGREEMENT OF SEPARATION.** An agreement of separation does not dissolve the marital relation of the parties, nor divest the wife of the first right to administer upon the estate of the husband. *Id.*
4. **ORDER FOR SUPPORT OF WIDOW AND MINORS.** When it is ascertained that an estate is insolvent, the County Court cannot make an order directing the executors to pay a portion of the assets of the estate for the support of the widow and minor children. *In the matter of the application of Caroline Heischler*, 597.
5. **CORRECTION OF JUDGMENT.** When the record discloses no error but a defect in the form of a judgment whereby the individual property of an administrator is made liable for the satisfaction of a judgment against him in his official character, it will be reformed by the Supreme Court at the costs of the appellee. *Myers, Administrator, v. Kendrick, Administrator*, 599.

See APPEAL, 7; JURISDICTION, 1-4; WITNESS, 3.

AGENCY.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. PLEADINGS. An agreement between the parties to an action stipulating the terms upon which a decree shall be entered, where filed in open court becomes a part of the record as a pleading, and cannot, unless for good cause shown, be stricken from the files, or withdrawn upon the motion of the parties, and a subsequent pleading inconsistent therewith should be stricken from the files. *Vail v. Stone et al.*, 284.

AMENDMENT.

See ATTACHMENT, 4.

APPEAL.

1. DUTY OF APPELLANT. It is the duty of the appellant to bring before the Supreme Court all the evidence upon which the decree from which he appeals was rendered. *Cook et al. v. Woodbury County*, 21.
2. APPEAL IN CHANCERY CAUSES. Chancery causes are tried on appeal, in the Supreme Court, *de novo*. *Blake v. Blake*, 40.
3. TIME. A cause was tried before a justice on the 8th day of the month, and the original transcript showed that an appeal bond was filed on the 19th day of the same month, while the bond was filed as of the 29th, and an amended transcript shows that the appeal was taken on the 29th. *Held*, that the court did not err in holding that the appeal was not taken in time. *Brown v. Beesett*, 185.
4. TIME. In an action by a junior incumbrancer against a senior mortgagee, in which two decrees are rendered, the respondent may appeal from the second decree notwithstanding a year has expired since the first one was rendered upon the default for want of an answer. *White v. Hampton et al.*, 259.
5. APPEAL IN CRIMINAL CAUSES. The District Court can acquire no appellate jurisdiction of a criminal proceeding by the mere filing of an appeal bond. The appeal can be perfected only by giving the notice required by § 5095 of the Revision of 1860 to the justice who rendered the judgment appealed from. *The State of Iowa v. Leyden*, 433.
6. SAME: TIME. A criminal cause cannot be appealed to the Supreme Court after the expiration of one year from the rendering of the judgment complained of. *The State of Iowa v. Fleming*, 443.
7. APPEAL BOND: ADMINISTRATORS. When an appeal is taken by executors from an order of the County Court removing them from office, and appointing their successors, and the bonds of such executors on file are sufficient to cover all the assets coming into their hands, the appeal bond should be in a sum sufficient to cover the costs of the proceeding. *In the matter of Pierson's Executors*, 449.
8. APPEAL FROM ORDER. An order discharging a rule requiring a County Judge to show cause why an appeal was not allowed from his order removing executors affects substantial rights and may be reviewed by the Supreme Court on appeal. *Id.*

9. **FAILURE TO PROSECUTE.** When the appellant fails to file arguments in compliance with the order of the court, the appeal may be dismissed for want of prosecution. *Niles & Co. v. Chicago, Iowa & Nebraska Railroad Company*, 598.

APPEARANCE.

1. **ALLEGATIONS TAKEN AS TRUE.** When a defendant makes an appearance in an action, but makes no answer nor excuse therefor, the allegations and petition will be taken as true. *Pfantz v. Culver & Co. et al.*, 312.
2. **APPEARANCE BY AGENT.** The defendant may appear by an agent and consent to judgment, and it is not necessary that the authority to make such appearance should be entered of record. *Brown v. Newman*, 546.

ASSAULT AND BATTERY.

See INFORMATION.

ASSIGNMENT.

See GARNISHMENT, 1; HOMESTEAD, 1; LEASE, 2; MERGER, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **RIGHTS OF SECURED CREDITORS UNDER AN ASSIGNMENT.** A creditor under a general assignment, who has special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid, after exhausting the property upon which he takes a special lien. *Wurts, Austin & McVeigh v. Hart et al.*, 515.
2. **STATUTE CONSTRUED.** Section 1832, chapter 17 of the Revision of 1860 provides a method for excepting to the genuineness or correctness of a claim or demand, but does not afford any plain, speedy and adequate remedy, whereby creditors holding securities may be compelled to exhaust them before taking dividends under the assignment. *Id.*
3. **GENERAL ASSIGNMENT: MORTGAGE.** Where a debtor conveyed a portion of his property to two creditors by mortgage, without their knowledge, and at the same time conveyed the remainder to a trustee by an assignment for the benefit of his creditors, all of which was done with a view to insolvency, it was held a general assignment in which creditors were preferred, and therefore void: following and re-affirming *Burrows v. Lehdorff*, 8 Iowa, 96. *Cole v. Dealham*, 551.
4. **GENERAL AND PARTIAL ASSIGNMENTS.** A debtor may in good faith make a partial assignment, preferring creditors; but when the whole transaction assumes the character and is in legal effect a general assignment he can give no preference. *Id.*
5. **ASSIGNMENT FOR BENEFIT OF CREDITORS.** To render a transfer of property void on the ground that it is a general assignment in which creditors are preferred, it must appear that the transfer was made with an intent to give a preference to creditors, and in view of insolvency. *Graves & Co. v. Alden et al.*, 573.
6. **SAME: EVIDENCE.** The sufficiency of evidence to show a general assignment invalid as preferring creditors considered and determined. *Id.*

See BAR.

ATTACHMENT.

1. **ATTACHMENT.** In an action for false representations, the damages being unliquidated, an attachment should not be issued until the requirements of § 1851 of the Code of 1851, have been complied with. *Gates v. Reynolds*, 1.
2. **ATTACHMENT: DAMAGES ON BOND.** Under § 3238 of the Revision of 1860 the defendant in an attachment suit, may, by way of counter-claim or cross-demand, recover in the principal action for damages sustained by reasons of the wrongful suing out of the writ: and when the bond is joint and several, both as to the obligors and obligees, one of the several obligees may set up such damages as a counter-claim against one of the several obligors. *Branch of the State Bank at Iowa City v. Morris et al.*, 136.
3. **ATTACHMENT: NON-RESIDENCE.** An allegation "that a defendant is not an inhabitant of this State" is equivalent to an allegation that the defendant is a *non-resident* of the State; and under the Code of 1851, was sufficient cause for the issuing of the writ of attachment. *Willie v. Stearns*, 282.
4. **AMENDMENT.** A petition or affidavit for an attachment may be amended and after the amendment the plaintiff is not prejudiced by the defect corrected; neither is it necessary to issue and levy a new writ upon the property attached. *Wadsworth & Wells v. Cheaney & Stinson*, 516.
5. **WRIT OF ATTACHMENT.** It is not necessary in a writ of attachment to recite the cause set out in the petition. *Id.*

See BOND, 1; JURISDICTION, 5.

ATTORNEY.

See CONSTITUTIONAL LAW, 4; COSTS, 1; COUNTY JUDGE, 1; DAMAGES, 4.

ATTORNEY GENERAL.

1. **ATTORNEY GENERAL AND DISTRICT ATTORNEY.** A criminal cause is under the control of the District Attorney until the Supreme Court acquires jurisdiction, after which it is under the sole control of the Attorney General. *The State of Iowa v. Fleming*, 443.

BAILMENT.

1. See ESTOPPEL, 1, as to receipt executed by bailee to bailor.

BAR.

1. **PLEA IN BAR.** An action pending in the District Court of the United States, brought by creditors of an assignor, to set aside an assignment made for the benefit of creditors, is not necessarily a bar to a proceeding in a State Court to enjoin the assignee from paying dividends under such assignment. *Wurts, Austin & McVeigh v. Hart et al.*, 515.

BASTARDY.

See LEGITIMACY; MARRIAGE.

BILL OF EXCEPTIONS.

1. **GENERAL EXCEPTIONS.** A general exception to the giving of each of "the instructions embraced in the charge of the court" when the charge involves several propositions of law, any one of which is not errone-

ous, presents no question for review on appeal. The same rule applies to a general exception by one party to the giving of instructions asked by the other; but when instructions are asked and refused, and such refusal is noted on the margin of each instruction, a general exception presents a question for review upon each instruction so refused. *Byser v. Weisgerber*, 2 Iowa, 463, cited and explained. *The Davenport Gas Light and Coke Company v. The City of Davenport*, 229; *Loomis, Conger & Co. v. Simpson*, 532.

2. **SAME.** Under the Code of 1851, a general exception to the charge of the court to a jury entitled the party excepting to present to the appellate court, for review, any erroneous position in any portion of the charge. *Wilhelmi v. Leonard et al.*, 330.
3. **SAME.** The rule of the Code of 1851, as to bills of exceptions, governs in actions commenced before the Revision of 1860 took effect. *Id.*
4. **PRACTICE.** The Supreme Court will not consider instructions or exceptions to evidence which are not by bill of exceptions or otherwise made a part of the record. *Wheeler v. Smith*, 563.

See **RECORD**.

BOND.

1. **SUBSTITUTED BOND.** When a new bond is substituted for the one filed at the commencement of an attachment suit, it takes the place of the original bond, and will be treated as if filed when the action was commenced. *Branch of the State Bank at Iowa City v. Morris*, 136.
2. **ACT OF CONGRESS CONSTRUED: SPECIAL BAIL.** The "special bail" contemplated by § 11, of the Judiciary act of 1789, does not include delivery bonds executed to discharge property from the levy of a writ of attachment. *Ramsey v. Coolbaugh & Brooks*, 164.
3. **SAME: EFFECT OF REMOVAL ON BOND.** The removal of a cause from a State to a Federal court, in accordance with the provisions of the Judiciary Act of 1789, does not of itself have the effect to render a delivery bond already filed in the cause inoperative; neither does such removal so enlarge or change the obligation of the sureties on such bond as to discharge them. *Id.*
4. **SAME.** The undertaking of the obligors on such a bond is not limited to the sheriff serving the process. It is for the benefit of the real parties in interest, and requires them to deliver the property to the officer who has the final process. *Id.*
5. **SUBSTITUTION OF BONDS.** Courts of general jurisdiction have, for purposes of substitution, full power over bonds filed on meane process, and an order permitting the withdrawal of one filed upon the performance of certain acts to keep intact the security, is not a "further proceeding" in a cause within the meaning of the Judiciary Act of 1789. *Id.*

See **APPEAL**, 7; **CONTRACT**, 3, 4; **COUNTY BONDS**, 1; **STEAMBOAT**, 3.

BRIDGES.

1. **LIABILITIES OF COUNTIES.** It is made by the statutes of Iowa the duty of the county in which a bridge is situated to make all repairs requiring an extraordinary expenditure of money; and this duty involves the corresponding liability for damages resulting from a neglect to make the same. *Wilson & Gustin v. Jefferson County*, 181.

2. SAME: DISTRICT SUPERVISOR OF ROADS. While it is the duty of the District Supervisor to make repairs requiring but little labor or expense; he is not liable for damages resulting from defects, the repairs of which would involve extraordinary expenditures. *Id.*

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CHANGE OF VENUE.

See VENUE.

COMMON CARRIER.

1. WAREHOUSEMAN. A warehouseman with whom goods carried by a Rail-



road Company are stored may retain possession of the same, when so instructed by the Company, until the "back charges" thereon are paid. *Alden & Co. v. Carver*, 253.

CONSPIRACY.

1. **INDICTMENT FOR CONSPIRACY.** It should appear on the face of an indictment for conspiracy, that the object of the conspiracy was criminal, or that the means to be employed in attaining it were criminal. *The State of Iowa v. Jones*, 269.
2. **SAME.** The words "to cheat and defraud," without more, do not necessarily imply a criminal object when alleged as the purpose of a conspiracy. *Id.*

CONSTITUTIONAL LAW.

1. **MUNICIPAL INDEBTEDNESS.** Article 11, § 3, of the Constitution of 1857, does not affect the validity of contracts entered into by municipal corporations before that instrument took effect. *Davenport Gas Light and Coke Company v. The City of Davenport*, 229.
2. **LAW UNCONSTITUTIONAL.** So much of § 32 of chapter 52 of the acts of 1858, as directs the County Judge to apportion one half the county school fund, in equal amounts to the several School Districts of the county, is inconsistent with § 7, art. 9, of the Constitution, which requires a distribution in proportion to the number of youths between the ages of five and twenty-one years. *The District Township of the City of Dubuque v. The County Judge of Dubuque County*, 250.
3. **BILL OF RIGHTS.** The bill of rights, in the Constitution of the State of Iowa, will not be so construed as to exclude, impair or deny any rights not enumerated therein, and retained by the people. *The State of Iowa, ex rel. The Burlington & Missouri River Railroad Company, v. County of Wapello*, 388.
4. **ATTORNEY'S FEE.** Section 4168 of the Revision of 1860, which establishes the maximum of attorney's fees for the defense of criminals under appointment by the court, is not inconsistent with § 18, Art. 1 of the Constitution. *Samuels v. The County of Dubuque*, 536.

CONSTRUCTION.

1. **RULE OF CONSTRUCTION.** Words in a Statute will not be construed as mere surplusage, if a construction can be legitimately found, which will give force to and preserve the entire statute. *Leversee v Reynolds*, 310.
2. **CONSTRUCTION OF CONTRACTS.** All parts of a contract are to be weighed and considered in giving it a construction. The court in construing a contract should arrive at the intention of the parties by looking at the language employed, the purpose in view, and all the circumstances attending the contract. *McCraney's Executrix v. Griffin et al.*, 318.

See CONTRACT, 3, 4; MARKET, 2.

CONTEMPT.

1. **CONTEMPT OF COURT.** When the court acts upon its own knowledge in the punishment of a contempt, a statement of the facts constituting the contempt should be made of record. *The State of Iowa v. Wiley*, 593.

See WITNESS, 2.

CONTRACT.

1. **CONSIDERATION.** A contract supported by a promise to do two things, one of which is legal and the other illegal, may be enforced as to that which is legal, unless the two are so bound together and mingled that they cannot be separated, in which case the whole promise will be treated as void. *Casady v. Woodbury County*, 113.
2. **CORPORATION.** The inability of a municipal corporation to pay an indebtedness incurred under a contract made by competent authority, cannot defeat an action thereon; neither can the corporation annul such a contract by notifying the other party that it cannot and will not pay the indebtedness which will be incurred by its execution. *The Davenport Gas Light and Coke Company v. The City of Davenport*, 229.
3. **CONSTRUCTION OF BOND FOR CONVEYANCE OF REAL ESTATE.** A bond for the conveyance of real estate stated the terms and conditions substantially as follows: 1. That the vendees had made the vendor certain notes, for different sums and maturing at different dates, all bearing ten per cent interest; that accruing on two of them to be paid annually in advance. 2. That they had paid him the sum of \$764, the receipt of which is acknowledged. 3. Vendees were to pay all taxes and charges that might accrue against the lots. 4. The vendor undertook, if the said notes and interest thereon should be paid on or before the time they may respectively mature, and if all the taxes should be paid, whenever called upon afterwards to convey, by deed of general warranty, the property described; but if the said notes and interest and taxes accruing were not paid, then the contract was to be void, and the vendor reserved the right to re-enter upon said premises. 5. "And I do further agree, upon payment to me of two thousand dollars to make a deed to lot number three (3) and upon payment of five hundred dollars for each lot I agree to make a deed to either or any of lots one, two, four and five, (1, 2, 4 and 5,) and upon the payment of \$290.07, for each lot, I agree to make a deed of either or any of the remaining lots above described to" said grantees "or their assigns and at their own expense." It was held:
 1. That after the payment of any of the sums named in the last clause or stipulation of the contract, the vendees or their assignees might elect to take the proper specific lot or lots; and that after such election and notice thereof to the vendor he would be bound to convey; but that he would not be in default by mere payment without an election and notice.
 2. That the sum paid when the contract was entered into should be estimated with those afterward paid in determining whether any one of the several amounts upon the payment of which the vendee was entitled to a conveyance, had actually been paid.
 3. That the vendee having paid in the aggregate more than the sum of \$2,000, but having failed to notify the vendor of his election to take a conveyance of lot three (3) before suit brought, was entitled to a conveyance upon the payment of the costs, and the taxes and charges thereon. *McCraney's Executrix v. Griffin et al.*, 313.
4. **CONSTRUCTION OF A CONTRACT.** A bond for the sale of real estate contained the following conditions: "The said S. (the obligee) paying promptly, time being the essence of the contract, his two certain promissory notes, of even date with this contract, the one in the sum of \$916.66, due on the 1st of January next, with ten per cent interest, and the other in the sum of \$1,833.32, due in six months from date, with ten per cent interest. If said notes are not paid promptly when due, I hereby reserve to myself the privilege of taking possession of said

premises and declaring this contract void, and all payments thereon forfeited, and it is understood the said S. is to pay all taxes that may accrue on said land, then this bond is to be carried into full effect. It is also understood that I am to deed said land to the said S. in such parcels as he may sell and wish to convey prior to the payment of the last note, provided said S. pays *pro rata* with the amount deeded."—*Held:*

1. If S., after the first payment as stipulated, should effect a sale and wish to convey a portion of the land, B. (the obligor) would be bound to convey the portion so sold, provided it did not exceed *pro rata* the sum paid.

2. That if within a reasonable time after notice of such a sale and demand for a conveyance, the obligor failed to execute the same, the obligee would be absolved from a further performance of the contract on his part.

3. That if the obligee should make the first payment and should not sell any portion of the land before the maturity of the last note, and made a default in the payment thereof, time being the essence of the contract, he would forfeit the sum paid.

4. Upon the payment of the first note, the obligee was entitled to a conveyance of a *pro rata* portion of the land when he made sale of the same. *Shaw v. Brown*, 508.

See CONSTRUCTION, 2; PUBLIC.

COPARTNERSHIP.

1. **JOINT AND SEVERAL PROPERTY.** A court of equity will not enjoin the sale of individual property of a copartner to satisfy a judgment against the firm of which he is a member, upon the ground that it has not been made liable by *scire facias*, when it is not alleged that the judgment was against the firm, and not against the individual members thereof; or when no issue is presented negating the fact that the property has been made liable by such process. *Quera*. Does the right to object to the levy of an execution on this ground extend to one claiming under the debtor? *Jones v. Jones et al.*, 276.
2. **COMPENSATION OF COPARTNER.** As a general rule, every copartner is bound to exercise due skill and diligence in promoting the interest of the copartnership, without reward or compensation, unless it be otherwise agreed between the parties; but such agreement may be implied from the course of business pursued between the copartners, as disclosed by the evidence; and when a partner renders services which neither the law nor the agreement of the parties imposes upon him, an agreement that he shall be paid is implied. *Levi v. Karrick et al.*, 344.
3. **BAD FAITH OF COPARTNERS.** A partner is required to exercise toward his copartners the utmost good faith in all matters relating to the copartnership, and if one deals with or uses firm property, he will be held to account for all profits arising from such use or transaction, and if loss arises from his fraud he is liable to his copartners for all injuries from such misconduct. *Id.*
4. **SAME: PLEADINGS.** To entitle copartners, in a suit to settle the business of the firm, to recover against a partner damages for the fraudulent use of firm property, the proper basis must be laid in the pleadings by allegations of the misappropriation complained of. *Id.*
5. **RULES FOR THE STATEMENT OF AN ACCOUNT.** When a copartnership was formed for the purpose of working a mining interest in certain lots

owned by the copartners, and each partner was to pay his equal proportion of the expenses according to his mining interests in said lots; and when the books of the copartnership were for a portion of the time in which the firm were engaged in mining, so kept that it was impossible to separate the expenses, it was held:

1. That in stating the accounts for the term during which they were kept separately, each partner should be charged with his proportion of the expenses incurred in raising mineral on each lot.
 2. That in stating an account for the time during which they were not thus kept, the entire expense should be apportioned to each lot in proportion to the value of the mineral raised, and the copartners charged in the ratio of their interest in each lot. *Id.*
6. COPARTNERSHIP DEBTS. The individual property of a partner can be subjected to the satisfaction of a judgment against the firm as such only by *scire facias*; it is otherwise when the judgment on a copartnership obligation is against the members of the firm as individuals. *Levally v. Ellis et al.*, 544.

See DEED, 4; CONFESSION OF JUDGMENT, 3; JUDGMENT; MERGER, 5; MORTGAGE, 12.

CORPORATION.

See CONTRACT, 2; CONSTITUTIONAL LAW, 1.

COSTS.

1. COSTS: ATTORNEY'S FEES. Attorney's fees cannot, in any case, be taxed to the losing party. *Blake v. Blake*, 40.
- See CONSTITUTIONAL LAW, 4; DAMAGES, 1.

COUNTY.

See BRIDGES.

COUNTY BONDS.

1. POWER OF COUNTY JUDGE. A county judge had no power to issue the bonds of the county running a series of years and drawing interest at the rate of ten per cent per annum, in the absence of any authority conferred by a vote of the people of the county, in the manner prescribed by law. *Casady v. Woodbury County*, 113.

See RAILROADS.

COUNTY JUDGES.

1. COUNTY JUDGE: ATTORNEY. When the county judge was the general agent of the county, he had the power, and it was his duty, to employ attorneys to represent the interest of the county in actions brought against him as an officer; and to pay a reasonable compensation for their services out of the county treasury. *Chickasaw County v. Bailey*, 435.

See ADMINISTRATOR; COUNTY BONDS · JURISDICTION.

COUNTY SEAT.

1. COUNTY SEAT: RECORD. In determining where the records of a county should be kept, the county judge had no power to go behind the record

of the election. *The State of Iowa, ex rel. Van Houten, v. The County Judge of Hardin County*, 139.

See MANDAMUS, 1.

COURT.

1. CITY COURT OF DUBUQUE. No appeal lies from a judgment of the City Court of Dubuque to the District Court. *The State of Iowa v. Hodnett*, 437.
2. SAME: RULES OF PRACTICE. While the criminal jurisdiction of the Dubuque City Court is limited to a class of cases triable before magistrates the mode of exercising this jurisdiction must be according to the rules which govern the District Court. *Id.*

COVENANT.

See LEASE.

CRIMINAL LAW.

1. NOTICE OF INTRODUCTION OF WITNESS. The defendant in a criminal cause who has accepted the service of a notice that a witness not named in the indictment will be introduced on the trial, and who has agreed to treat such notice as personally served, cannot object that it was not signed by the district attorney. *The State of Iowa v. Watrous*, 489.
 2. JUDGMENT ON VERDICT WITHIN THREE DAYS: PRACTICE. When the record shows that a judgment was rendered upon a verdict in a criminal cause in less than three days after the verdict was returned by the jury, and that the court continued in session for more than that time, the Supreme Court will, unless all presumptions of prejudice are clearly rebutted, remand the cause, not for a new trial but for another judgment. *Id.*
 3. CRIMINAL PRACTICE. When the defendant was regularly indicted, tried and convicted of a misdemeanor, and judgment rendered thereon, *held* that it is not necessary that the record should show that the defendant was asked if he had any legal cause to show why judgment should not be pronounced against him. *The State of Iowa v. Stieff*, 603.
- See APPEAL, 5, 6; ATTORNEY GENERAL; BILL OF EXCEPTIONS, 5; CONSPIRACY; INFORMATION; PRACTICE, 6; TRESPASS; VERDICT.

DAMAGES.

1. DAMAGES FOR FALSE REPRESENTATIONS: RESCISSION OF CONTRACT. The purchaser of real estate cannot, in an action against the vendor, recover as damages, for false and fraudulent representations made by such vendor in the contract of sale, the amount of the money value of the consideration received by such vendor, when it is not shown that the plaintiff has offered to rescind the contract by placing the parties in *status quo*. *Gates v. Reynolds*, 1.
2. SAME. In an action for false representations in the sale of land, if the contract has not been rescinded, or the plaintiff has not offered to rescind, the measure of damages is the difference between the actual value of the land purchased and its value as it was represented by the vendor. *Id.*

3. **MAL-PRACTICE:** In an action for damages against a physician for non-fulfillment of contract in the treatment of a disease which he had undertaken to treat; and for gross negligence in treating the same, the plaintiff may recover vindictive as well as actual damages. *Cochran v. Miller*, 128.
4. **ATTORNEY'S FEES.** The successful party in an action on an ordinary contract, in the absence of malice or want of probable cause, is not allowed attorney's fees. *Newell v. Sanford & Childs*, 463.

See ATTACHMENT, 2.

DAVENPORT.

See MARKET.

DECREE.

1. **AMOUNT.** Where a petition in equity prayed judgment for the amount *then due*, and no supplemental petition or further prayer was filed, it was held that the court erred in rendering a judgment for a sum which included installments which became due after the commencement of the suit. *Blake v. Blake*, 40.
2. **JUDGMENT: JOINT OBLIGATION: MERGER.** A decree in foreclosure which finds and determines the order and amount of the several liens on the mortgaged premises, and finds and adjudges that there is due from a firm of which the mortgagor is a member, to another defendant, a certain sum on a copartnership note, secured by a junior mortgage, and orders a sale of the mortgaged property for the payment of the same, without giving the holder a full and complete remedy against such mortgagor, does not operate to discharge the other joint obligors. *Beall v. West*, 61.
3. **DECREE UNDER A GENERAL PRAYER.** A court of equity cannot, under a general prayer, grant relief for which no proper basis has been laid in the allegations of the petition. *Casady v. Woodbury County*, 113.
4. **DECREE RE-AFFIRMED.** The decree in *Sprott v. Reed*, 3 G. Greene, 498, re-affirmed. *De Louis v. Sage*, 146.
5. **WHEN SETTLEMENT AND DECREE ARE CONCLUSIVE.** A settlement between a mortgagor and mortgagee, and a decree thereon finding and establishing the sum due from one to the other, are conclusive, unless it is made to appear that such settlement and decree were obtained by fraud. *Clarke v. Bancroft, Beaver & Co.*, 320.

See EXEMPTION, 1; HOMESTEAD, 5; LIEN, 6; REDEMPTION; USURY, 2.

DEED.

1. **DEED BY ATTORNEY.** When an attorney in fact, acting under a power of attorney executed by both husband and wife, signed a deed of conveyance as the attorney of the husband only, it was held: 1. That the deed operated to convey only the husband's interest, and did not bar the dower of the wife; 2. That the failure to execute the deed as the attorney of the wife could not be aided by evidence showing a mistake on the part of the attorney in drawing the deed. *Wilkinson v. Getty et al.*, 157.
2. **CANCELING DEFEASANCE:** When the maker of a note executed for money borrowed, conveyed to the payee a tract of land by a deed absolute on

its face, and received from such payee a bond for a reconveyance, upon the payment of the sum borrowed, of which contract time was made the essence; and at the maturity of the note, it was by agreement of parties delivered to the maker, and the bond was returned to the obligor for the purpose of having both canceled, and with the intent that the title to the land should vest absolutely in such grantee and obligor, it was held, that the parties did not thereafter sustain to each other the relation of mortgagor and mortgagee; and that after canceling the note and bond, the maker of the note had no title to such land. *Venum v. Babcock et al.*, 194. ✓

3. **UNACKNOWLEDGED DEED.** A deed defectively acknowledged is valid as between the parties and all persons having knowledge of its existence. *Haynes, Hutt & Co. v. Seachrest et al.*, 455.
4. **RATIFICATION: VERBAL AND IN WRITING.** A deed conveying the property of a firm, executed by one member for himself and for his co-partner, is sufficient and valid as a deed of the firm, if ratified either expressly or by implication, verbally or in writing; but such ratification will not affect the rights of subsequent purchasers or incumbrances which have already accrued. *Id.*
5. **SAME.** A recognition which will have the effect to make a deed valid, which but for such ratification would be ineffectual to pass the title, as against the party or subsequent incumbrancer should be clear and express, or be implied from circumstances equally clear and undisputed. *Id.*

See EQUITY, 5; EVIDENCE, 1, 2; FRAUD, 6; MORTGAGE, 8.

DEFAULT.

1. **WAIVER OF DEFAULT.** A default is waived by the filing of an answer, without leave of court, if the adverse party fails to object to pass the title, and joins issue upon the allegations thereof, and submits such issue, upon the pleadings, to the court. *Jones v. Jones et al.*, 276.
2. **DEFAULT PENDING DEMURRER.** A default cannot be entered against a defendant who has a demurrer on file and undisposed of. *Key v. Hayden et al.*, 602.

See APPEARANCE.

DEFENSE.

1. **NEGLECTENCE AS A DEFENSE.** In an action against a Railroad Company for a breach of contract to leave freight cars on a side track for the purpose of receiving and taking away freight, the defendant, in one count of his answer, alleged that the plaintiff had negligently permitted freight cars to stand upon the said side track so near the main one that one or two collisions had taken place, and there was danger of others, and the plaintiff was unwilling to become responsible for the injuries that might result from such negligence. It was held, that as this defense was not set up as a counter-claim or set-off, and was not stated as a defense in bar, it was properly stricken from the answer. *Amsden v. The Dubuque and Sioux City Railroad Co.*, 132.
2. **NUISANCE: DEFENSE.** A municipal corporation cannot appropriate to its own use gas furnished by a company, and avoid payment therefor on the ground that the works at which it is manufactured are a nuisance, when such works have never been, in the proper manner, declared a nuisance. *The Davenport Gas Light & Coke Company v. The City of Davenport*, 229

DEPOSITION.

1. **EVIDENCE: IMPEACHMENT: DEPOSITIONS.** When two different depositions of the same witness have been taken in the same cause, the first one taken cannot be introduced for the purpose of impeaching the second, when no foundation was laid in the second deposition by calling the attention of the witness when such second deposition was taken to the statements made in the first, for the purpose of affording him an opportunity to confirm or explain the same. A general statement in the second deposition, that when the first was taken the witness was sworn in the usual form, and that his testimony was then correctly written out by the officer, is not sufficient. *Samuels v. Griffith et al.*, 103.
2. **DEPOSITIONS:** A deposition taken by one party may be used in evidence by the other; following *Pelamourges v. Clark*, 9 Iowa, 1; *Crick v. McClintic*, 4 G. Greene, 290. *Wheeler v. Smith*, 564.
3. **COMMISSION TO TAKE DEPOSITIONS.** Under § 4069, of the Revision of 1860, it is sufficient in a commission to take a deposition in the United States or Canada, to name the county and State in which the Commissioner resides. When the deposition is to be taken in a foreign country, the commission should state the name of the city or town in which the officer resides. *Lyon v. Barrows*, 428.
4. **DEPOSITION: EXHIBITS.** A deposition should not be suppressed on the ground that the witness referred to certain deeds which were not set out as exhibits, when it appears that the deeds and notes were not under the control of the witness, were not the basis of the action, and there was no dispute as to their contents. *Id.*

See PRACTICE, 5.

DISTRICT ATTORNEY.

See ATTORNEY GENERAL, 1.

DIVORCE.

1. **DIVORCE: INHUMAN TREATMENT.** An attempt to injure the person of the wife is not essential to constitute inhuman treatment to such an extent as to authorize a divorce. Acts which endanger the life of the wife by destroying her health and peace may constitute sufficient ground for divorce. *Beebe v. Beebe*, 10 Iowa, re-affirmed. *Caruthers v. Caruthers*, 266.

DUBUQUE.

1. **APPROPRIATION OF PROPERTY FOR STREETS: CONDITION PRECEDENT.** Under § 3, chapter 54, Laws of 1853 (An act to amend an act to incorporate the city of Dubuque) and chapter 17, Laws of 1855, a tender of a deed conveying the property appropriated for a street was not a condition precedent to the right of the owner to recover damages. Neither is it essential to show that the city council has, by resolution, declared the street to be opened. It is sufficient to show the confirmation by the council, of the action of the jury selected to estimate the damages, in any manner, such confirmation being of record. *Blake v. The City of Dubuque*, 66.

See COURT.

EQUITY.

1. **EVIDENCE.** When proof is introduced which destroys the case made by a bill to which there is no answer relief should be denied. *Cook et al. v. Woodbury County*, 21.
2. **EQUITY: REFORM OF CONTRACTS: MISTAKES OF FACT.** A court of equity may reform mistakes of fact in contracts, whether they prejudice one party or the other; but this power does not extend to the making of a new contract for the parties by correcting mistakes of law. *Casady v. Woodbury County*, 113.
3. **LEVY OF EXECUTION UPON PERSONAL PROPERTY.** In equity a judgment creditor will be compelled to exhaust the personal property of a judgment debtor before resorting to real estate purchased by a third person, of such debtor, in good faith and for a valuable consideration, before such judgment was rendered, but which by reason of a mistake in descriptions was not conveyed at the time the lien attached. *Jones v. Jones et al.*, 276.
4. **BILL AND ANSWER.** When the allegations of a bill are explicitly denied in the answer and the cause is submitted without proof to sustain the affirmative allegations of the bill, the chancellor must find against the complainant. *Id.*
5. **DEED IN EQUITY.** A deed executed by a county judge, under the county seat pre-emption Act of Congress, passed April 6th, 1854, to a party in possession wrongfully or by fraud against the party legally entitled thereto, will be treated in equity as conveying only the legal title in trust for the beneficiary. The grantee thus holding the property subject to the paramount equity, may be decreed to convey. *Hall v. Doras & Baker*, 368.
6. **SAME: ESTOPPEL.** A court of equity will not enforce such a conveyance when the party legally entitled thereto has neglected and failed to assert his right or to enforce his ownership of the property, for such a length of time and under such circumstances as to estop him from questioning the title of the actual occupant. *Id.*
7. **EQUITABLE DEFENSE AT LAW.** An equitable defense cannot be made available against the legal title to real estate in an action at law. *Abbot v. Chase*, 453; *Allyn v. Johnson*, 604.
8. **DEFENSE AT LAW.** A defendant in chancery will not be permitted to set up a defense, which he has neglected to interpose, and which he should have interposed, to an action at law involving the same subject matter. *Daltor v. Lous & Guye*, 538.

See CO-PARTNERSHIP; EXECUTION, 1; MARSHALING SECURITIES; MISTAKE. PLEADINGS IN EQUITY; TITLE.

ERROR.

1. **ERROR WITHOUT PREJUDICE.** The judgment of the court below will not be reversed because of an error in excluding evidence when such ruling did not result in prejudice to the appellant. *Thrift v. Rodman*, 25; *Fromms v. Jones*, 474.
2. **SAME.** A cause will not be reversed because improper evidence was admitted, when the record shows affirmatively that such evidence was not considered by the court. *Amsden v. The Dubuque & Sioux City Railroad Company*, 132.

3. **ADMISSION OF IMPROPER EVIDENCE.** The Supreme Court will not reverse the judgment of the court below upon the ground that improper evidence offered by appellee was admitted, when it is shown by the record that the appellee was entitled to judgment upon the pleadings. *Pfants v. Culver & Co. et al.*, 312.

ESTOPPEL

1. **RECEIPT BY BAILER.** The bailee of personal property is, by his receipt executed to the bailor, binding himself to account for the same to such bailor, estopped from denying the right of the bailor to the possession. *Reed v. Reed*, 5.
2. **MORTGAGE.** A party cannot claim the benefit of a lien under a mortgage which he alleges has been discharged by merger, and was invalid as a fraud upon creditors. *Wilhelmi v. Leonard et al.*, 330.

See EQUITY, 6; TAXES.

EVIDENCE.

1. **EVIDENCE: TAX DEEDS.** Tax deeds regularly executed under the revenue law of 1841, are *prima facie* evidence of the regularity of all prior proceedings in the levy of the tax and the sale of the property; and when such deed is attacked the burden of showing a failure to comply with the requirements of the law, in such proceedings, is upon the party making such attack. When, however, no record of the levy of the tax, or of the sale, is in existence, the burden is upon the party claiming under the deed. *Long et al. v. Burnett*, 28.
2. **REQUISITES IN A DEED.** The failure to recite one of the requisites to a valid levy of a tax in a deed in which all the proceedings had in such levy and all others essential to its validity are set out, is evidence, by implication, that the requirement omitted was not complied with. *Id.*
3. **EVIDENCE IN SLANDER.** In an action of slander the plaintiff may show the pecuniary condition of the defendant in aggravation of damages; and the defendant may be permitted to show the same in mitigation of damages. *Karney v. Paisley*, 89.
4. **EVIDENCE AND INSTRUCTIONS.** The sufficiency of evidence tending to show fraud in obtaining a check, as a basis for an instruction, considered. *Terhune v. Henry & Carmichael*, 99.
5. **PLEADINGS: EXECUTION OF NOTE.** Under chap. 108, Laws of 1853, the supposed maker of a bill or note may prove that it was not his deed. The burden of proving the execution can be placed upon the holder only by a sworn denial. Following *Lyon v. Burn*, 6 Iowa, 48. *Id.*
6. **LEADING QUESTION.** A question propounded to a witness in a form which would suggest an answer unfavorable to the party propounding it should not be regarded as leading. *Cochran v. Miller*, 128.
7. **OPINION.** In an action for damages for mal-practice in the medical treatment of plaintiff by defendant, the father of the plaintiff who had the means of knowing the treatment she had received, was asked, "whether or not he would most likely have known of the application of any other medicines than those applied by the defendant, if they had been applied to the arm?" *Held*, That the question was not objectionable as asking for an opinion. *Id.*

8. **BILLS.** In an action by a gas light company against a municipal corporation for the value of gas furnished under a contract for two months named, it was held, that the bills for gas furnished during the months immediately preceding under the same contract, approved by the council of the corporation, were admissible for the purpose of showing, *first*, the number of lamps lighted, and *second*, that the city recognized the validity of the contract under which it was furnished, and its liability to pay for the same. *Davenport Gas Light and Coke Company v. The City of Davenport*, 229.
 9. **ANSWER.** The answer of one defendant cannot be read in evidence against his co-defendant when there is no joinder or privity of interest, or fraud, or collusion, or combination between them. *Jones v. Jones et al.*, 276.
 10. **CROSS-EXAMINATION.** The court below did not err in refusing to permit a witness to be interrogated on cross-examination touching a conversation which was not either wholly or partially referred to in the direct examination. *Wilhelmi v. Leonard et al.*, 330.
 11. **DEED AS EVIDENCE.** In a trial of an indictment for willful trespass by cutting down and destroying timber in which the meridian of the land injured was not named, a deed in which the meridian was named was not held inadmissible for that reason. *The State of Iowa v. Watrous*, 489.
 12. **EVIDENCE: INABILITY TO CONVEY.** In an action for damages sustained by reason of a breach of contract to convey lands, a deed showing that the title was not in defendant, at the time the conveyance should have been made is admissible when tending to sustain an allegation in the pleading upon which issue is joined. *Shaw v. Brown*, 508.
 13. **EVIDENCE IN REPLEVIN.** In an action of replevin by an administrator the plaintiff may explain his inventory of the property of the estate he represents by parol evidence showing that it embraces the proceeds of a sale of the property in controversy. *Wheeler v. Smith*, 564.
 14. **ALTERATION: BURDEN OF PROOF.** When the execution of a county order is not denied under oath the burden of showing that it was altered after execution is upon the maker. *Warren v. Chickasaw County*, 588.
- See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 6; **DEPOSITION**; **INSTRUCTIONS**, 3; **LEGITIMACY**; **MARRIAGE**; **RECORDS**; **REPLEVIN**, 4, 5; **TRESPASS**; **WITNESS**.

EXEMPTION.

1. **EXEMPTION: EVIDENCE.** The sufficiency of the evidence to show that a team was "habitually used" by the owner to earn a livelihood, and was exempt from execution, considered. *Bevan v. Hayden*, 122.
2. **SAME: CONSTRUCTION.** The exemption laws should be liberally construed. *Id.*
3. **SAME: TEAM.** A team which has been procured in good faith for the "habitual use" of the owner in earning a livelihood, is exempt from levy and sale under execution. *Id.*
4. **SALE OF EXEMPT PROPERTY.** A person owning property exempt from execution, may dispose of the same by sale, and an attachment levied while a sale is being made and before it is perfected, does not affect the right of the owner under the exemption laws. *Id.*

EXECUTION.

1. **EXECUTION OF DECREE.** In proper cases a court of equity may issue a proper process to enforce the execution of a decree ordering the surrender of lands. *White v. Hampton et al*, 259.
2. **EXECUTION VALID AS TO OFFICER.** An execution which showed that the judgment under which it was issued was "recovered before G. S. M." without stating that he was a justice of the peace, was not absolutely void in the hands of a constable, so as to enable him to protect himself from liability on his bond for improper or negligent treatment of property seized or levied upon by virtue thereof. *Dean v. Goddard*, 292.

See COPARTNERSHIP; EQUITY, 3; EXEMPTION; SUPPLEMENTAL PROCEEDINGS.

FORECLOSURE.

See LIEN; MORTGAGE, 7; PARTIS; USURY.

FRAUD.

1. **FALSE REPRESENTATIONS.** To entitle the purchaser of real estate to recover for false representations made by the vendor, in the contract of sale, it must be made to appear that they were made with a knowledge that they were false; following *Holmes v. Clarke*, 10 Iowa, 433. *Gates v. Reynolds*, 1; *Kimmans v. Chandler & Lockhart*, 327.
2. **CONTINGENT DAMAGES.** The vendee cannot recover damages for false representations when it appears that such damages are contingent and not actual. *Kimmans v. Chandler & Lockhart*, 327.
3. **PRESUMPTIONS OF FRAUD.** A sale of real estate by a parent to a child, in contemplation of insolvency, for a consideration different from that expressed in the deed, the grantee not taking possession under the sale, and failing to file the deed for record for a considerable time after the execution thereof, may, from the nature of the transaction and the relation of the parties, be presumed fraudulent; but such presumption is not sufficiently strong to overcome a positive denial of fraud in a sworn answer. *Culbertson & Reno v. Luckey et al*, 12.
4. **CONSIDERATION: FRAUD.** The fact that the consideration named in a deed is greater than that actually paid, is of itself insufficient to set aside a sale as fraudulent. *Id*.
5. **FRAUD IN SALE.** When the evidence showed that the grantor and grantee of real estate sustained to each other the relation of parent and child; that the grantor was indebted in a considerable sum, and desired to avoid the payment of the same; that the sale was made on the day the debtor demanded security for his debt; that the deed was hurriedly executed and placed on record; that the grantee borrowed all the purchase money, and the same money was returned to the lender within a few days, and that the property conveyed embraced all the property belonging to the debtor and grantor non-exempt from execution; it was held sufficient to overcome the allegations of an answer by defendants denying fraud, and to authorize a decree declaring such sale void. *Vandell v. Vandell*, 247.
6. **DEED BY A WIFE.** Where a trust deed was executed by a husband and wife conveying several town lots, including the homestead, and it was shown

by the evidence that the wife executed it without reading, upon the statement of her husband, that it conveyed certain property mentioned, which did not include the homestead, and the trustee and beneficiary had no knowledge of, and was in no wise a party to, this false representation; it was held, that as between the wife and innocent parties, who acted in good faith in the transaction, she could not take advantage of such negligence, and make it the ground of relief against the consequences of her own signature. *McHenry v. Day et al.*, 445.

7. **SAME: ACKNOWLEDGMENT.** A wife will not be permitted to take advantage of her own irregular and wrongful acts in the acknowledgment of a deed, against parties who, ignorant of such acts, have loaned money upon the security thus acknowledged, but which was regular and fair upon its face. *Id.*

See **EVIDENCE; LIMITATION; JUDGMENT BY CONFESSION**, 1; **COPARTNERSHIP; EQUITIES**, 5, 6.

GAMING.

1. **GAMING.** Money lost in gaming and paid to the winner cannot be recovered back. *Thriff v. Redman*, 25.

See **INDICTMENT**, 6.

GARNISHMENT.

1. **TRANSFER AND ASSIGNMENT.** When all the right, title and interest of the payee of an acceptance against a judgment debtor is transferred to a garnishee before service of notice of garnishment, he is entitled to credit for the amount thereof on any debt due from him to the said debtor, though the assignment in writing was not executed until after such notice. *Aliter* when the parties had not completed the negotiation and transfer. *Dyer v. McHenry & Co.*, 526.
2. **PRACTICE IN GARNISHMENT.** Under § 3270 of the Revision of 1860, if issue is not taken upon the answer of a garnishee at the same term at which it is filed, the garnishee is entitled to notice before further proceedings are had; but such notice is unnecessary where there is a voluntary appearance either in person or by attorney. *Kiame v. Anderson, Garnishee*, 565.
3. **GARNISHMENT: NEGLIGENCE.** Neglect to proceed against a garnishee until he becomes insolvent does not operate to discharge the judgment debtor. *Brice v. Carr*, 599.

GUARANTY.

1. **GUARANTORS: STATUTE CONSTRUED.** Section 954, of the Code of 1851, was not repealed or changed by the provisions of "An Act relating to evidence," which took effect February 9th, 1854. *Sibley v. Van Horn*, 209.

HOMESTEAD.

1. **LEASE: HOMESTEAD: ASSIGNMENT.** P. leased to S., a certain lot for a term of five years, for an annual rent agreed upon, and in the contract it was further agreed that if S. should erect a building suitable for a family, and a stable on said premises, the lessor should pay to the

lessee the value of the same on the expiration of the term. The lessee made the proposed improvements and occupied the house as a homestead: *Held*.

1. That the right of the possession of the premises during the term under the lease could not be assigned by the husband without the concurrence of the wife.
2. That an assignment by the husband alone would carry to the assignee the right to recover of the lessor the value of the improvement at the expiration of the term. *Pelam v. De Bevard et al*, 53.
2. **HOMESTEAD.** The homestead embraces the lot and buildings appurtenant to the house, including those used and occupied by the owner in the prosecution of his ordinary business, but it does not include buildings which are rented to others and yield a revenue to the owner. *Kurz v. Brusch*, 371.
3. **SAME: OCCUPATION.** The occupation of a building as a homestead after the execution of a trust deed conveying the same, in which the wife did not concur, cannot change the *status* of the parties. *Id*.
4. **CONVEYANCE OF HOMESTEAD.** A conveyance of the homestead by the husband without the concurrence of the wife is void. *Larson v. Reynolds & Packard*, 579.
5. **SAME: DEATH OF THE WIFE.** When the husband executed a mortgage, conveying the homestead, without the concurrence of the wife, and the wife subsequently died, after which the husband was again married; and after the second marriage, the husband permitted a decree to be entered by default, foreclosing the mortgage, in an action to which the second wife was not made a party, it was held:
 1. That the conveyance made by the husband without the concurrence of the first wife was invalid, and did not operate to preclude the right of the homestead to the second wife.
 2. That the decree was conclusive as to the husband, but did not bind the second wife, for the reason that she was not a party to the proceeding. *Id*.
6. As to debt contracted in the purchase of a homestead, see *Hurley v. Gilchrist*.

HUSBAND AND WIFE.

1. **POSSESSION OF PERSONAL PROPERTY.** Under § 2499 of the Revision of 1860, personal property in the common use and joint possession of the husband and wife, is *prima facie* under the control of the husband, and is subject to his debts to third persons. The wife can protect herself only by a compliance with the provisions and requirements of the section above mentioned. *Smith v. Hewett*, 94.
2. **HUSBAND AND WIFE.** In 1841 a decree was rendered against E. H., a *feme sole*, who in 1854, intermarried with one H. D. L., after which an execution was issued under the decree, and the real estate of the defendant therein sold to satisfy the same. The property was purchased by one G., who immediately assigned the sheriff's certificate to H. D. L., the husband, to whom the sheriff's deed was subsequently issued. *Held*, That there was no legal incapacity in the husband to acquire this property in this manner; and that as there was no evidence of fraud or bad faith, a title acquired through the conveyance to him should be sustained. *De Louis et al. v. Sage*, 146.

3. **HUSBAND AND WIFE.** In an action against a husband and wife on a promissory note, the wife pleaded coverture, to which plaintiff replied alleging that the note was given for family expenses and necessities, and that the wife expressly agreed upon the face of the note that her separate property should be liable for the same. *Held*, That a demurrer to the replication should have been overruled. *Case v. Semple*, 596.

See ADMINISTRATOR, 3; DIVORCE; FRAUD, 6, 7; WITNESS, 1.

INDICTMENT.

1. **NUISANCE.** Indictment for causing and continuing a public nuisance by establishing, keeping and using "a certain building or place" for the sale of intoxicating liquors is sufficiently definite in its description of the place. *The State of Iowa v. Kreig*, 462.
2. **WILLFUL TRESPASS: INDICTMENT.** In an indictment for willful trespass in cutting down and destroying timber on the land of another, one statement of the venue is sufficient; and when it is averred as being upon the land of a certain person named, and described by section, township and range, omitting its situation with reference to the nearest meridian line, it is sufficient if the county in which it is situated is set out. *The State of Iowa v. Watrous*, 489.
3. **SAME.** An indictment is sufficient when the offense is charged with such certainty, and in such manner, as to enable a person of common understanding to know what was intended, and the court to pronounce judgment according to the law of the case. *Id.*
4. **SAME.** In an indictment for willful trespass by cutting down and destroying timber, it is sufficient to allege that the injury was done by cutting down and destroying, without being more specific. *Id.*
5. **SAME: CHARGES IN DIFFERENT FORMS.** An indictment may charge an offense in different forms, to meet the testimony; and if it may have been committed in different modes or by different means, these may be alleged in the alternative; but in charging an offense in different forms, the pleader is not compelled to use the alternative form of expression. *Id.*
6. **DUPLOICITY IN INDICTMENT.** An indictment is not objectionable on the ground of duplicity when the defendant is charged in the first count with keeping a gambling house; and in the second, with permitting other persons, in a place under his control, to play at cards or other games for money. *The State of Iowa v. Bitting*, 600.

See CONSPIRACY.

INFORMATION.

1. **ASSAULT AND BATTERY: INFORMATION.** An information charging a defendant with inhumanly whipping and beating his own child, is sufficient as an information charging an assault and battery; but it should set out the name of the person upon whom the offense was committed. *The State of Iowa v. Bitman*, 485.

INJUNCTION.

1. **RECORD: INJUNCTION.** The Supreme Court will not reverse the decree of the court below making an injunction perpetual when it does not

appear affirmatively on the face of the record that all of the evidence which was before the court below is embraced therein. *Hayden & Butterworth v. Wittke et al.*, 604.

INSTRUCTION.

1. **IMPERFECT INSTRUCTIONS.** It is not error to refuse an instruction when asked in terms requiring modification. *Bevan v. Hayden*, 122.
2. **INSTRUCTIONS.** A suggestion by the court below to the jury that the case at bar had been twice tried and that it was important that they should agree, if they could satisfy their minds as to the right of the case between the parties, was not erroneous. *Niles et al. v. Sprague et al.*, 198.
3. **COMPETENT EVIDENCE.** Where the court instructed the jury that a certain fact must be proved by *competent* evidence to entitle the plaintiff to recover, it was held that as nothing but competent evidence was before the jury, whose province it was to determine its sufficiency or weight, the instruction would not be construed as directing the jury to consider whether or not it was legally fit or suitable to prove such fact. *Id.*
4. **INSTRUCTIONS.** Written instructions read and delivered to the jury as the instructions of the court should be so considered by the jury, though they are not signed by the judge; and the appellant cannot complain of the failure of the judge to sign instructions given when they are made a part of the record by bill of exceptions. *The State of Iowa v. McCombs*, 426.
5. **PRACTICE.** Instructions which are not signed by the judge, nor filed with the clerk, and which are not marked either "given" or "refused" will not be considered by the Supreme Court. *The State of Iowa v. Watrous*, 489.
6. **INSTRUCTION ON EVIDENCE.** An instruction not warranted by the evidence should be refused. *Shaw v. Brown*, 508.
7. **INSTRUCTION AND EVIDENCE.** The Supreme Court will not review an instruction given by the court below when such instruction was based upon evidence which is not presented in the record. *Hamline v. Beck*, 602.
8. **INSTRUCTIONS MUST BE PART OF THE RECORD.** The Supreme Court will not review instructions which have not been made a part of the record, either by the signature of the Judge, as contemplated by §§ 4813 and 4814 of the Revision, or by being incorporated into the bill of exceptions. *The State of Iowa v. Gebhardt*, 473.

See RECORD.

INSURANCE.

1. **INSURANCE: FORFEITURE BY ADDITIONAL INSURANCE.** A policy of insurance contained the following conditions: "That if the said assured or his assignees shall make any other insurance on the same property, and shall not, with reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." The assured thereafter obtained three different policies in different companies, each of which was upon the condition that if the interest insured was a leasehold it should be so stated in

the policy, otherwise it would be void. The interest of the assured in the lot upon which the insured property was situated was a leasehold, but that fact was not stated in either of said policies. After the loss, these policies were treated as valid and paid by the companies which issued them. It was held, in an action on the policy containing the condition above set out, that the subsequent policies, so far as the assured was concerned, were valid and binding, and that obtaining them without notice to the defendant was a violation of such condition, and rendered the policy void. *David v. The Hartford Insurance Company*, 69.

2. **WAIVER.** The assessment and collection of a portion of a premium note, by a mutual insurance company, after it has been advised of a violation of the conditions of the policy, operates as a waiver of any forfeiture by reason of such violation: following *Keenan v. The Missouri State Mutual Insurance Company*, 12 Iowa, 126. *Keenan v. The Dubuque Mutual Fire Insurance Company*, 375.
3. **NOTICE TO AN INSURANCE COMPANY.** The knowledge an officer of an insurance company acquires by rumor, or by information, in his individual capacity, is not constructive notice to such company. *Id.*

INTEMPERANCE.

1. **SALE OF INTOXICATING LIQUORS.** A sale of intoxicating liquors made in another State for the purpose and with the intent to enable one of the parties to violate the law of this State for the suppression of intemperance is void. It is otherwise when not made for that purpose. *Datter v. Laue & Guye*, 538.

JOINT OBLIGORS.

See **PARTIES**, 4; **PLEADINGS AT LAW**, 1; **COPARTNERSHIP**, 1, 6; **JUDGMENT**.

JOINDER OF PARTIES.

See **PLEADINGS**, 1.

JOINDER OF CAUSES OF ACTION.

See **PLEADINGS**, 1

JUDGMENT.

1. **JUDGMENT AGAINST A FIRM.** When a judgment is rendered against a firm in its firm name, the property of the individual members can be rendered liable only by *scire facias*. *Hamsmith v. Espy*, 439.
2. **SAME: MEMBERS OF A FIRM.** When a judgment on a copartnership obligation is rendered against the members of a firm, as individuals, the sale of individual property for its satisfaction is not irregular or void. A creditor, in a proper case, may in equity compel a resort to copartnership property. *Id.*
3. **DISCHARGE OF JUDGMENT: CONSIDERATION.** When a bill praying an injunction to restrain the execution of a judgment against one of several defendants alleged that the complainant, who was one of the defendants, paid to the judgment plaintiff a sum which was larger than his share of the judgment debt and costs, which was accepted in full

satisfaction of all claims against the complainant and in consideration of his release and discharge from all demands under and by virtue of said judgment; to which bill the respondents demurred on the ground that the contract of discharge was unsupported by a consideration; it was held that the demurrer was properly overruled. *Langworthy v. Woodworth & Cummings*, 530.

4. **EXCESSIVE JUDGMENT.** When the judgment of the court below is excessive it will be corrected by the Supreme Court at the costs of the appellee. *Knapp v. Miller et al.*, 596.

See ADMINISTRATOR, 5; DECREE; SCIRE FACIAS; STEAMBOAT.

JUDGMENT BY CONFESSION.

1. **JURY: FRAUDULENT JUDGMENT.** The question whether in *point of fact* a judgment by confession was fraudulent is within the province of a jury. *Aliter* when the question is upon the sufficiency of the statement. *Wilhelms v. Leonard et al.*, 330.
2. **CONFESSION OF JUDGMENT.** When a written confession of judgment is duly sworn to, filed in open court and judgment thereon rendered in strict accordance with its terms, and when the defendant without attempting to impeach the consideration, or deny the amount due, moves the court to set aside such judgment upon the sole ground that the facts "were not concisely stated," to which the plaintiff responds by showing the good faith of the transaction and the nature of the consideration, the judgment should be upheld and the motion overruled. *Churchill et al. v. Lyon*, 431.
3. **CONFESSION OF JUDGMENT AGAINST A FIRM.** A confession of judgment by one member of a copartnership, for the firm, is valid only against the copartner making it. *North & Scott v. Mudge & Co.*, 496.

JURISDICTION.

1. **JURISDICTION OF PROBATE COURT.** The jurisdiction of a probate court over the settlement of the estate of a deceased person attaches and becomes effective only upon the granting of letters of administration; and the power to make an order directing the sale of real estate for the payment of debts, arises only upon the presentation, by the legal and regular administrator, of the petition prescribed by law. *Long et al. v. Burnett*, 28.
2. **SAME.** The presentation of such a petition by the administrator confers upon the court jurisdiction of the subject matter, and its subsequent proceedings will be presumed as regular and conclusive as those of courts of general jurisdiction. When jurisdiction so far attaches as to require the court to hear and determine the sufficiency of the facts relied upon to confer such jurisdiction, whether they relate to the law, the process, the notice, or the petition, the action of the court will not be collaterally reviewed. *Id.*
3. **ADMINISTRATOR'S BONDS: JURISDICTION.** The District Court has original jurisdiction of actions for breaches of the conditions of administrator's bonds. *Wheelhouse v. Bryant*, 160.
4. **SAME: COUNTY COURT.** While the County Court may, in the summary manner provided by §§ 1387-9 of the Code of 1851, enforce compliance with an order directing an administrator to make payments in accordance with the prior order of the court, such court does not have exclusive jurisdiction. *Id.*

5. JURISDICTION OF JUSTICES IN ATTACHMENT. The jurisdiction of a Justice of the Peace, in attachment, is not limited to the township in which the defendant resides, or in which the property sought to be attached may be found, but extends through the county. Revision of 1860, § 3853. *Leversee v. Reynolds*, 310.

JURY.

1. JUROR: INTEREST: CHALLENGE. In the formation of a jury the challenges should alternate between the parties, the plaintiff having the first challenge. Revision of 1860, § 3036. *Davenport Gas Light and Coke Company v. The City of Davenport*, 229.
- SAME: INTEREST. Where in an action against a city a juror stated that he was a taxpayer and resident of the city, but that he had no opinion as to the case which would prevent his rendering a verdict according to the law and the evidence, it was held that the court did not err in sustaining a challenge for cause. Revision of 1860, § 3039. *Id.*

LEASE.

1. COVENANTS: RESERVATION OF RENTS. In a contract of lease, a reservation of rent was in the following words: "At a yearly rent of one thousand dollars for the first ten years, and twelve hundred and fifty dollars for the remaining nine years, payable at the expiration of each and every year of the lease. * * * * * The said lessees well and truly keeping and performing their part of these premises, to be by them performed as aforesaid." It was held that the language amounted only to an implied covenant to pay the rent, and the liability of the lessee determined on the assignment of the lease to another, and the acceptance of rent by the lessor from the assignee. *Fanning v. Stimson*, 42.
2. ASSIGNMENT OF LEASE. A lease may be assigned by the lessor so as to give to the assignee the right to recover the rent reserved, without a sale or transfer of the reversionary interest. *Watson v. Hunkins*, 547.

See HOMESTEAD, 1.

LEGITIMACY.

1. LEGITIMACY. A child born in wedlock, though but a short time after marriage, is presumed legitimate, and the issue of a marriage which is voidable merely is legitimate, and cannot be bastardized in a collateral proceeding by showing that the marriage was voidable. *Niles et al. v. Sprague et al.*, 198.
2. EVIDENCE: ACKNOWLEDGMENT. Slight evidence of a reputed relationship, accompanied by acknowledgments on the part of the reputed father, is not alone sufficient to establish the heirship of such father to the child. *Id.*
3. SAME: DECLARATIONS. The declarations of a husband and wife are not competent to establish the illegitimacy of a child begotten and born during wedlock; but the declarations of a mother and putative father are admissible for the purpose of showing that they were never lawfully married. *Id.*

LIEN.

1. JUDGMENT LIEN. Under the Code of 1851 the lien of a judgment attached to whatever interest the defendant had in real estate, whether such interest appeared of record or not. *Denegre v. Hann*, 240.

2. **SAME: LIMITATION: SCIRE FACIAS: REVIVOR.** Under the Code of 1851 the lien of a judgment continued in force for ten years; but the right to enforce it by execution existed but for five years, unless revived by *scire facias*. *Id.*
3. **SAME: REVIVOR OF LIEN: SCIRE FACIAS.** Where two judgments were recovered, one in 1847 and one in 1848, which subsequently attached, under the Code of 1851, as liens upon equitable interests in certain real estate, which judgments remaining unsatisfied in 1854, a new judgment was recovered on them as in an action of debt, for an amount equal to both judgments and costs up to that date, it was held that the judgments of 1847 and 1848 were merged in the judgment of 1854, and that the liens of the same upon the real estate of the defendant were thereby discharged; and that a sheriff's sale of the premises under the last judgment, made in 1858, conveyed the interest of the defendant, subject to any other liens thereon or rights therein acquired prior to the rendering of such judgment. *Id.*
4. **LIEN: REVIVOR.** While a judgment may be revived, there is no revivor of the lien of a judgment on real estate. The revivor of a judgment by *scire facias* creates no new lien. *Id.*
5. **JUDGMENT LIEN SUBJECT TO EQUITABLE INTEREST.** The lien of a judgment creditor upon the land of his debtor is subject to all the equities which exist in favor of third persons against such lands at the time of the recovery. *Jones v. Jones et al.*, 276.
6. **JUDGMENT IN FORECLOSURE.** A judgment on a note secured by mortgage is a lien on the mortgaged property only from the date at which it was recovered, when it does not order a foreclosure of the mortgage. *Wilhelm v. Leonard et al.*, 330.

See NOTICE, 1; MORTGAGE, 7; STEAMBOAT.

LIMITATIONS.

1. **STATUTE OF LIMITATION.** When the legal title to real estate has been obtained by fraud, an action to recover by the actual or equitable owner may be commenced at any time within five years after the discovery of the fraud. Code of 1851, §§ 1659 (clause 3,) and 1660. *McLennan et al. v. Sullivan et al.*, 521.

MAL-PRACTICE.

See DAMAGES, 3.

MANDAMUS.

1. **RECOUNT OF VOTES.** The District Court has power to compel the board of canvassers to recount the votes cast at an election to fix the location of a county seat; and the judgment of the court upon the return of the board to a writ of mandamus is, until it is reversed, binding, and cannot be collaterally impeached. *The State of Iowa, ex rel. Van Houten, v. The County Judge of Hardin County*, 139.

See COUNTY SEAT, 1.

MARKET.

1. **PUBLIC MARKET.** The council of the city of Davenport has power to authorize an individual to erect a building upon private property, and

to lease or rent the rooms and stalls therein for a market; to declare such building a public market-place, and to dictate the mode and manner of conducting the markets therein; to exact rates of rent that shall not operate as a restraint upon the trade of the city; and to protect the owner in the exclusive privilege of such market; overruling *The City of Davenport v. Kelley*, 7 Iowa, 102. *Le Claire v. The City of Davenport*, 210.

2. **SAME: RULE OF CONSTRUCTION.** The courts will not construe an ordinance making such a grant as void upon the ground of public policy, unless such construction is clearly deducible from its language. *Id.*

MARRIAGE.

- ✕ 1. **EVIDENCE OF MARRIAGE.** The sufficiency and weight of evidence tending to show marriage, considered and discussed. *Niles et al. v. Sprague et al.*, 198.
2. **RECORD EVIDENCE OF MARRIAGE.** The laws of Ohio require that a certificate of marriage shall be returned by the officiating minister or officer to the clerk of the county, by whom it should be recorded. *Held*, that an exemplification of the certificate would be admissible in evidence; but that an exemplification of a mere note or memorandum on the records of the clerk would not be admissible. *Id.*

See LEGITIMACY.

MARSHALING SECURITIES.

1. **MARSHALING SECURITIES.** While a court of equity will compel a creditor who has recourse to two funds for the satisfaction of his demand to exhaust that upon which he alone has a lien before resorting to the fund upon which another creditor has recourse; but it will not be done to the prejudice of the rights of either creditor. *Clarke v. Bancroft, Beaver & Co.*, 320. ✓
2. **SAME: NOTICE.** The creditor having a lien upon but one fund to secure the payment of his demand should notify creditors having liens upon the same and other funds, before they have relinquished their control over such funds, that they will be compelled to exhaust them first. *Id.*

MASTER IN CHANCERY.

1. **REPORT OF MASTER IN CHANCERY.** An order referring a chancery cause was as follows: "On motion and consent, this cause is referred to S. H. L., as commissioner, to examine and report his conclusions, under the rules and practice of this court." *Held*, that the commissioner was not required to write out and report the evidence of each witness in the language in which it was submitted; and that a statement of his conclusions drawn from the evidence was sufficient. *Byington v. Hampton et al.*, 23.

MEASURE OF DAMAGES.

See ATTACHMENT, 2; DAMAGES.

MERGER.

1. **MORTGAGE: ASSIGNMENT.** The acquisition of the absolute title to real estate by a mortgagee of the same, after an assignment and transfer of the mortgage to a third person, does not operate to merge the mortgage. *White v. Hampton et al.*, 259. ✓
2. **MORTGAGE.** When a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage and the mortgage debt are extinguished, unless it expressly or impliedly appears that the parties intended otherwise. *Wilhelms v. Leonard et al.*, 330. ✓
3. **SAME: PRO TANTO.** When a mortgagee takes a conveyance of a part of the mortgage property, it operates to extinguish the mortgage debt *pro tanto*; and when there are two mortgages to secure the same debt, one of personal and one of real property, a purchase by the mortgagee, at a sale made under a senior incumbrance, of the realty does not discharge the mortgage on the personality. *Id.*
4. **MERGER.** When a demand of an inferior degree is changed into one of a higher character, the former is merged into the latter. *North & Scott v. Mudge & Co.*, 496.
5. **SAME: COPARTNERSHIP.** A judgment against one partner upon a demand against the firm, is a bar to another action upon the same demand against the firm. *Id.*

MISTAKE.

1. **MISTAKE.** A court of equity will correct a mistake in a deed as against a subsequent purchaser who acquires his interest with knowledge of the existence of the deed and of the mistake therein. *Haynes, Hull & Co. v. Seachrest et al.*, 455.

See EQUITY, 2, 3.

MORTGAGE.

1. **SCHOOL FUND MORTGAGE: ASSIGNMENT.** Where the first incumbrance on a parcel of real estate was a mortgage to the school fund commissioner to secure the repayment of a portion of the school fund, loaned nominally to the mortgagor, but, in fact, to one of the sureties, who, on the same day, became a second mortgagee of the same premises, and subsequently, and after the assignment of his mortgage to a third party, acquired the absolute title; and after a third incumbrance was placed upon the property by the grantee of the first mortgagor (who was the second mortgagee) the assignee of the second mortgage paid to the school fund commissioner the amount due upon the first mortgage, whereupon it was assigned to him by said commissioner, (without recourse,) it was held, that a court of equity would not treat this payment as a satisfaction of the mortgage, but would compel the third incumbrancer to refund the amount thus paid by such assignee for the redemption of the property. *White v. Hampton et al.*, 259. ✓
2. **ORDER OF PAYMENT.** Where C executed a mortgage to secure the payment of a sum named, six months after date, and a further sum two years after date, and the mortgagee afterwards assigned a portion of the sum last maturing to G, and all of the remainder to R, it was held that the proceeds arising from the sale of the mortgaged premises should be applied, first, to the satisfaction of the sum first maturing; second, to the satisfaction *pro rata* of the claims of the assignees of

the last payment; following *Grapengether v. Fjervary*, 9 Iowa, 164; *Rankin v. Major*, Id., 297; *Reeder v. Carey et al.*, 274. *Massie v. Sharpe et al.*, 542. ✓

3. **PURCHASER OF MORTGAGE PROPERTY.** The purchaser of mortgaged property is not, in the absence of a special contract, liable for the mortgage debt; and the mortgagee's remedy, so far as it affects the purchaser, is against the property and his equity of redemption. *Johnson v. Monell*, 300. ✓
4. **CONSTRUCTION OF MORTGAGE.** The grantee of real estate, delivered to the grantor certain promissory notes, executed by third parties, in part payment of the purchase money therefor, and agreed to deliver notes to pay the balance within two months, and executed a mortgage of the property conveyed, to the grantor, conditioned that if said purchase money, and interest at ten per cent, be paid by the payment of said notes at their face, and ten per cent interest after their transfer to said grantor, the obligation should be void, &c. *Held*, That the mortgage was a security for any balance of purchase money remaining unpaid after the proceeds arising from the collection of the notes transferred to the grantor had been applied thereon. *Clarke v. Bancroft, Beaver & Co.*, 320. ✓
5. **EXECUTION OF NEW NOTE.** When the holder of one of the several notes secured by mortgage delivered up the note to the mortgagor and maker, and took a new note for a different amount, payable at another date, and without any agreement that it should be secured by the mortgage, it was held that the holder lost his right to the security as against the holder of the other notes secured by the mortgage. *Wilhelmi v. Leonard et al.*, 330. ✓
6. **CHATTEL MORTGAGE.** While the mere retention of mortgaged personal property by the mortgagor does not render the mortgage fraudulent, such retention under circumstances which show that it is for the benefit of the mortgagor alone, will justify a jury in finding that it is not *bona fide*. *Id.*, and *Fromme v. Jones*, 474.
7. **MORTGAGE: PRIORITY.** A deed of trust conveying certain real estate belonging to S. & M., was executed by M. for both himself and S. without any authority to make such a conveyance for S. Afterwards S. & M., with their wives, united in the execution of a mortgage to another party to secure the payment of two notes. On one of these, which had been assigned by the mortgagee, an action was commenced by the assignee, in which sufficient personal property to satisfy the same was attached, but was discharged upon the execution of a delivery bond. In a proceeding to foreclose the last named mortgage, to which the assignee was not a party, it was held:
 1. That it was error to decree a sale of the mortgaged premises for the satisfaction of the note which had been assigned.
 2. That the deed of trust executed by M. was entitled to priority upon his interest in the property therein described.
 3. That the lien of the mortgage was entitled to priority as to the interest of the other mortgagors, and that the mortgagees were entitled to a foreclosure for the amount which remained due them. *Haynes, Hutt & Co. v. Seachrest et al.*, 455.
8. **ABSOLUTE DEED: MORTGAGE: CONSTRUCTION OF DEED.** Where M. entered lands in his own name, with the money and for the use of H., and afterward conveyed the same to H. by a deed which was never recorded; and H. mortgaged the same to a third party who assigned the mortgage to M., who afterwards acquired possession of the unre-

corded deed and destroyed it: *Held*, that M., was a mortgagee merely and could divest H., of his title only by foreclosure. *Hull v. McCall et al.* 467.

9. **SALE: TIME ESSENCE OF CONTRACT.** The general rule as to forfeiture of contracts for the conveyance of real estate, when time is made the essence of the same, does not apply to contracts for reconveyance of property conveyed by an absolute deed to secure the payment of a debt. *Id.*
10. **RECORD OF MORTGAGE.** When a mortgage was executed in the name of a firm by the *sole* member thereof, and was recorded as a mortgage executed by such member individually, it was held sufficient to impart notice. *Fromme v. Jones*, 474.
11. **SAME: CHATTEL MORTGAGE.** The recording of a chattel mortgage is not essential when the possession of the mortgaged property passes to the mortgagee at the time of the execution of the mortgage. *Id.*
12. **MORTGAGE BY A PARTNER.** One partner may sell or dispose of co-partnership property for the payment or security of a copartnership debt. *Id.*
13. **MORTGAGE NOT FRAUDULENT.** A mortgage of all the property of the mortgagor to secure the payment of one debt, if made in good faith, is not fraudulent, even when the mortgagor is insolvent; neither is it void as an assignment for the benefit of a preferred creditor. *Id.*
14. **AGREEMENT TO EXECUTE A MORTGAGE.** A court of equity will enforce a valid agreement to execute a mortgage, against the party or a subsequent purchaser with notice; but a promise to secure a creditor is not such an agreement to execute a mortgage as can be specifically enforced. *Cole v. Dealham*, 551.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, 3; **DEED**, 2; **DEORER**, 4; **RETOPPEL**, 2; **LIEN**, 6; **MERGER**; **NOTICE**, 1, 2, 4; **PARTIES**; **PLEADINGS IN EQUITY**; **REDEMPTION**, 2, 6, 7.

NEGLIGENCE.

See **DEFENSE**, 1; **EQUITY**, 8.

NEW TRIAL.

1. **CONVERSATION IN PRESENCE OF A JUROR.** When a witness, after he had testified and before the trial was concluded, had a conversation with several persons, in the presence of one of the jurors, in which he stated some material matters not elicited in the examination, which conversation occurred without any knowledge on the part of the witness of the presence of the juror; and the witness was recalled before the conclusion of the trial, and was interrogated as to the matters detailed in the conversation; it was held, that the circumstances did not constitute sufficient ground for a new trial. *Thrift v. Redman*, 25.

NOTICE.

1. **NOTICE OF PRIORITY OF LIENS.** A junior mortgage recorded prior to a senior mortgage is entitled to priority of lien, unless the junior mortgagee, and those claiming under him, had actual or constructive notice of its contents or existence; or such notice as was sufficient to put them, as reasonable men, upon inquiry, particularly if such inquiry would have

led to a discovery of the rights of the senior mortgagee. And such notice is sufficient if imparted before the completion of a contract of purchase or the payment of the purchase money, though not until after the terms of the contract have been agreed upon. *English v. Waples*, 57.

2. **SAME: NOTICE TO AN ASSIGNEE.** Where the second mortgagee had actual notice of the existence of a prior mortgage, which was recorded before an assignment of the second mortgage, it was held that the assignee was charged with notice. *Id.*
3. **CONVEYANCE: NOTICE.** Third persons are bound by notice of conveyance to the same extent they would be by the recording of a deed in all respects regular and perfect. *Wilson v. Holcomb*, 110.
4. **RECORD OF MORTGAGE.** In an index entry of a mortgage filed for record, the words "see record" were written in the column in which the description of the lands should have been set out, instead of such description: *Held*, that it was sufficient to charge a subsequent incumbrancer with notice, following *Calein v. Bowman and Neal*, 10 Iowa, 529; *Bostwick v. Powers et al.*, 12 Id., 456. *White v. Hampton et al.*, 259.
5. **RECORD: OF MISTAKE.** When the Register in recording a mortgage, which conveyed two tracts of land, entered in the column for descriptions, in the index book, a description of but *one* of them, it was held:—
 1. That the record was not constructive notice to subsequent purchasers or incumbrancers as to the tract the description of which was omitted: following *Scoles v. Wiltsey*, 11 Iowa, 261.
 2. That the consequences of the omission of the Recorder to correctly describe the property conveyed fall upon the first mortgagee and not upon subsequent incumbrancers, following *Bradford v. Miller et al.*, 12 Iowa, 14. *Noyes, Adm'r, v. Horr et al.*, 570.

See DEED, 3; INSURANCE, 3; MORTGAGE, 10.

NUISANCE.

See DEFENSE, 2; INDICTMENT, 1

OMISSION.

See PRACTICE, 6.

PARTIES.

1. **FORECLOSURE: ADMINISTRATOR A PROPER PARTY.** In this state the administrator of a deceased mortgagor is a proper, if not a necessary party to a proceeding to foreclose the same; and in such a proceeding the administrator of the mortgagor (or if it be a deed of trust, the administrator of the grantor) may upon his own motion be made a party. *Darlington v. Effe*, 177.
2. **MORTGAGOR.** A mortgagor who has disposed of his interest in the mortgage premises is not a necessary party to a proceeding to foreclose the mortgage. *Johnson v. Monell*, 300.
3. **PARTIES IN FORECLOSURE.** The purchasers of mortgaged property are proper parties to a proceeding to foreclose the mortgage, and the mortgagor who has disposed of his equity of redemption is not a necessary party. *Semple v. Lee et al.*, 304.

4. **JOINT OBLIGATION: ACTION AFTER DEATH OF AN OBLIGOR.** At common law an action could be maintained on a joint obligation, after the death of one of the obligors, only against the survivors: but under § 2764 of the Revision of 1860, an action may be maintained against either the administrator of the deceased obligor or the survivors; whether the death occurred before or after the taking effect of the Revision. *Sellon & Co. v. Braden*, Adm'r, 365.

See REPLEVIN, 3.

PLEADINGS AT LAW.

1. **TAX TITLE: JOINDER OF CAUSES OF ACTION.** Several distinct parcels of land, conveyed under a tax sale by different deeds, when they are the property of one, or of several joint owners, may be joined in one action to foreclose the tax title; but the petition should contain a distinct allegation as to each parcel, and show the amount for which a lien is claimed upon each one. *Byington v. Wood et al.*, 17.
2. **SWORN PLEADINGS: SET-OFF.** A set-off is not a pleading within the meaning § 1745 of the Code of 1851, and when sworn to, even as an answer demanded under oath, has no weight as evidence. *Thrift v. Redman*, 25.
3. **PLEADING OVER.** A further answer upon which issue was joined and trial had, which presented the same defense set out in the counts of the original answer, to which a demurrer was sustained, operates as a waiver of any error in the ruling of the court sustaining the demurrer. *The Davenport Gas Light and Coke Company v. The City of Davenport*, 229.
4. **PLEADING IN JUSTICES' COURT.** The plaintiff, in an action in a Justices' Court, claimed for making "a set of teeth upon silver plate;" for making a "set of teeth upon gold;" for "filling teeth" and for "extracting teeth;" giving the dates of the several items: *Held*, that the charges were sufficiently specific to require the defendant to respond thereto, and that the court below did not err in overruling defendant's motion for a more specific statement. *Brownell v. Smith*, 287.
5. **INDEFINITE DEMURRER.** Where a demurrer to a petition at law set out two causes: "That the matters set forth in said petition do not constitute any cause of action against the defendant; and that said petition does not show such a state of facts as will justify the court in granting any relief by judgment or otherwise, to said plaintiff," it was held that it should have been disregarded by the court. *McKellar et al. v. Stout*, 487.
6. **PLEADINGS: SPECIAL AND COMMON COUNTS.** A party cannot recover on the *quantum meruit* under a count setting up a special contract; but such recovery may be had under a pleading setting up both a special and a common count. *Formholz v. Taylor et al.*, 500.
7. **PLEADINGS:** An objection to a petition on the ground that it stated more than one cause of action in a single count should be taken by motion and not by demurrer. *Swords v. Russ*, 603.

See AGREEMENTS; APPEARANCE, 1; ATTACHMENT, 3, 4; BAR; EVIDENCE, 9; PRACTICE, 1.

PLEADINGS IN EQUITY.

1. **UNANSWERED PETITION IN EQUITY.** A petition in equity, when undenied, is taken as confessed, but the extent of such confession is frequently measured by the exhibits attached. *Cook et al. v. Woodbury County*, 21.

2. **WEIGHT OF SWORN ANSWER IN CHANCERY.** An answer in chancery under oath, in response to a petition demanding a verified answer, is equal in weight to the evidence of a disinterested witness. *Culbertson & Reno v. Luckey et al.*, 12. But it is not evidence when it is not demanded in the petition. *Connelly v. Carlin et al.*, 383.
3. **PLEADINGS: EVIDENCE.** A sworn answer in chancery, when not demanded under oath, puts in issue only the allegations of the bill; following *Sheppard v. Ford*, 10 Iowa, 502. *Wilson v. Holcomb*, 110.
4. **UNDENIED ALLEGATIONS IN AN ANSWER.** Under the provisions of § 1740 of the Code of 1851, an allegation of usury in an answer to a petition for the foreclosure of a mortgage, when undenied by any replication or other pleadings, should be taken as true. *Alexander v. Doran et al.*, 283.
5. **PLEADINGS: MULTIFARIOUSNESS.** A bill is not multifarious when it joins a good cause of complaint, growing out of the same transaction, where the defendants are all interested in the same claim of right, and when the relief asked in relation to each is of the same general character. *Walkup v. Zehring*, 306.
6. **SAME: EXHIBITS.** In a proceeding to set aside a sheriff's sale of real estate, on the ground that it had been conveyed by, and did not belong to, the judgment debtor at the time of the sale, the execution and the sheriff's deed are not necessarily exhibits. *Id.*
7. **SWORN PLEADING.** An answer under oath to a cross-bill demanding a sworn answer, so far as it is responsive, is equivalent to the evidence of a disinterested witness. *Clarke v. Bancroft, Beaver & Co.*, 320.
8. **CROSS-BILL.** Where a mortgagee is made a party defendant in a foreclosure proceeding, and by his cross-bill alleges that his mortgage lien is prior to that of complainant's, the complainant may join issue thereon by proper allegations in the replication or answer to the cross-bill, notwithstanding he has made no allegations of priority of bills in the petition: and under an issue thus joined the complainant may introduce evidence to show that his mortgage was admitted to record prior to respondents. *Id.*
9. **VERIFIED ANSWER IN CHANCERY.** A sworn answer in chancery denying the allegations of the petition, places the *onus* of supporting such allegations upon the complainant; but the old rule requiring the evidence of two witnesses, or of one witness and strong corroborating circumstances to sustain allegations on which issue is thus joined does not obtain under the system of procedure in this State. *Graves & Co. v. Alden et al.*, 573.

See EQUITY, 4.

POSSESSION.

See ESTOPPEL.

POWER.

1. **EXECUTION OF POWER.** The non-execution of a power cannot be aided by proof of an intention to execute it. *Wilkinson v. Getty*, 157. ✓

See EQUITY; DEED.

PRACTICE.

1. **PLEADINGS: PAYMENT OF TAXES: MOTION AND DEMURRER.** A bill for the foreclosure of a tax title averred generally, that the plaintiff had paid all the taxes levied subsequent to the sale, for two years, and that said taxes amounted to a certain sum which was named: *Held*, That an objection to the bill could be properly presented by a motion for a more specific statement, but not by demurrer. *Byington v. Woods et al.*, 17.
2. **ORDER OF EVIDENCE.** The Supreme Court will not interfere with the exercise of discretion by the District Court, as to the order in which evidence is introduced, except in cases of manifest abuse. *Samuels v. Griffith et al.*, 103.
3. **PRACTICE: NEW QUESTIONS IN APPELLATE COURT.** The Supreme Court will not consider questions not raised and passed upon in the court below. *Bevan v. Hayden, Sheriff*, 122; *Betts v. Farrell*, 572
4. **PRACTICE ON DEMURRER.** A demurrer to an answer setting up three distinct causes of defense was sustained in the court below, which ruling was reversed by the Supreme Court as to the first cause, and was not passed upon as to the remaining defenses. It was held:
 1. That the cause was remanded for trial only on the first cause, and that as to the others the defendant had no standing in court.
 2. That on a second appeal, the Supreme Court would consider the sufficiency of the demurrer as to the defenses undetermined on the first appeal. *Bates v. Kemp*, 223.
5. **OBJECTIONS TO DEPOSITIONS IN APPELLATE COURT.** An objection to a deposition, other than for incompetency or irrelevancy, will not be considered by the appellate court when it was not made before the deposition was offered in evidence in the court below. *Aiverson v. Bell*, 308.
6. **SUPPLYING OMISSION.** When the record in a criminal cause discloses that in the trial before the justice, the defendant was present, and asked for a jury, a plea of not guilty is presumed, if the justice failed to enter it upon his docket, and in such cases the District Court may, under § 3928 of the Revision of 1860, order a plea of not guilty to be supplied as an apparent omission on the face of the record. *The State of Iowa v. McCombs*, 426.
7. **MOTION TO TRANSFER.** The Supreme Court will not interfere with the ruling of the court below, in refusing to transfer a cause to the chancery docket, upon the suggestion of an equitable defense, when it does not appear that the character and nature of that defense was fully stated; or when such defense is based upon a title bond, and there is no suggestion that it has not been forfeited. *Abbott v. Chase*, 453.
8. **MOTION TO SET ASIDE A SALE.** The court should not pass upon a motion to set aside a sheriff's sale without notice to the adverse party. *Lyster v. Brewer*, 461.
9. **CORRECTION OF ERROR.** The Supreme Court will not review a ruling granting a default before a notice to set the same aside has been made in and overruled by the court below: following *Pigman v. Denny*, 12 Iowa, 396; and *McKinley v. Bechtel*, 12 Iowa, 561. *Downing v. Harmon*, 535.
10. **ORDER OF EVIDENCE.** The court may in the exercise of its discretion receive evidence after the testimony has been closed; and the Supreme Court will interfere with the exercise of such discretion only in cases of abuse. *Wheeler v. Smith*, 564.

See ADMINISTRATOR, 5; BILL OF EXCEPTIONS; CRIMINAL LAW; DEFAULT; ERROR; GARNISHMENT, 2; INSTRUCTIONS; RECORD; VENUE.

PRESUMPTIONS.

1. **PRESUMPTIONS IN FAVOR OF THE DECREE BELOW.** When the record in a chancery cause does not disclose the evidence upon which the decree below was rendered, the appellate court will presume that it was sufficient to sustain the decree. *Semple v. Lee et al.*, 304.
2. **SAME.** When the record in a criminal cause discloses that in the trial before the justice, the defendant was present, and asked for a jury, a plea of not guilty is presumed, if the justice failed to enter it upon his docket. *The State of Iowa v. McCombs*, 426.
3. **SAME.** When the record does not show that all of the evidence submitted to the court below is before the Supreme Court, the presumptions are in favor of the finding below. *Morton & Co. v. Chase & King*, 597.

See FRAUD, 3.

PRINCIPAL AND AGENT.

1. **POWER TO BIND THE PRINCIPAL.** The authority of an agent of a banking house to discount notes and take security does not include the power to receive for the principal a conveyance of real estate, and to bind such principal by a bond for a reconveyance by a deed containing a covenant of general warranty. The power of such an agent, in the absence of special instructions, is governed by the uniform rule or custom of the house. *Tidrick & Norris v. Rice*, 214.
2. **SAME: CUSTOM.** When a banking house which was in the habit of discounting notes and taking conveyances of real estate as securities (executing back bonds for reconveyance), used printed forms in executing such bonds, which forms contained a covenant of special warranty, it was held, that such form should have been regarded by an agent in the nature of special instructions, or a rule of the house for the transaction of that class of business. *Id.*
3. **SAME: NOTICE.** A party taking from an agent a bond containing a covenant of general warranty must, at his own peril, ascertain the nature and extent of the agent's authority. *Id.*
4. **SUB-AGENT.** When the employment of a sub-agent is necessary to the transaction of the business of the principal, if the agent makes a fit and suitable selection, he is not responsible to the principal for his acts. *Loomis, Conger & Co. v. Simpson*, 532.
5. **DELEGATION OF AUTHORITY.** While the authority of a factor or an agent cannot be delegated, a principal may confer the power of delegation or substitution, either expressly or impliedly; or may, after delegation by the agent, ratify or confirm the same in such manner as to make the sub-agent responsible directly to the principal; but the fact that the principal knows that a sub-agent or factor will be employed does not relieve the liability of the agent to the principal. *Id.*

See APPEARANCE.

PROMISSORY NOTE.

1. **DEFENSE.** Where two notes were executed for the purchase money of real estate, and the payee and vendee executed his bond to the maker

conditioned for the conveyance of such real estate upon the payment of the note last maturing, it was held, that the failure or inability of such vendor to make the conveyance at the maturity of such second note did not constitute a good defense to an action on the note first maturing, by a third party holding it indorsed after maturity but before such defense existed. *Bates v. Kemp*, 223.

2. **PAYMENT IN CURRENCY TO AN AGENT.** Ordinarily the holder of a promissory note is not bound to receive in payment of the same anything but money or coin at its true value; and if the holder is a mere agent, he has no right, unless specially authorized so to do, to accept anything else in lieu of money. *Graydon, Swanwick & Co. v. Patterson & Co.*, 256.
3. **SAME.** A payment in currency to the holder, who was the collecting agent of the payee of a promissory note, of a sum equal to the amount due thereon, does not, when not controlled by some custom known to, or some authority conferred or ratified by, the principal, operate to discharge the notes. *Id.*
4. **EXTENSION OF TIME: DISCHARGE OF SURETY.** An extension of the credit beyond the time specified in a promissory note, under a contract founded upon a good consideration, between the creditor and the principal, without the consent of the surety, has the effect to discharge such surety; and the surety may, in an action at law, set up such defense, and show by extrinsic evidence, if it does not appear on the face of the note, that he was in fact merely a surety: reaffirming *Kelley v. Gillespie*, 12 Iowa, 57. *Coriell v. Allen et al.*, 289.
5. **SAME: USURY.** That the contract for extension of credit was supported by a note for usurious interest as its only consideration, will not avoid the effect of discharging the surety from his liability. *Id.*
6. **INDORSEMENT.** The indorsement of a promissory note after maturity carries with it all equities between the parties. *Kurz v. Holbrook et al.*, 562.
7. **ALTERATION: SECURITY.** A new consideration is not essential to support an assent by a security to an alteration in the date and amount of a promissory note, whether such an assent be expressed either before or after the alteration is actually made. *Pelton v. Prescott et al.*, 567.
8. **PROMISSORY NOTE TRANSFERRED AS COLLATERAL SECURITY.** The assignee of a note transferred before maturity, as collateral security for a pre-existing debt, without any new consideration, is not a holder for value, in the usual course of trade: following *The Trustees of Iowa College v. Hill*, 12 Iowa, 462. *Ryan & Louthan v. Chew*, 589.

See APPEARANCE, 2; EVIDENCE, 5; GUARANTY.

PUBLIC.

1. **CONTRACT: PUBLIC POSTS.** The phrase "public posts" in a contract for the lighting of a city with gas, includes posts erected and used for the benefit of the public, and is not restricted to those owned by the city. *The Davenport Gas Light and Coke Company v. The City of Davenport*, 229.

RAILROAD.

1. **RAILROAD COMPANY: CONTRACT.** The liability of the Dubuque and Sioux City Railroad Company, on a contract of the Dubuque and Pacific Railroad Company, considered and determined. *Ameden v. The Dubuque and Sioux City Railroad Company*, 132.

2. **RAILROAD SUBSCRIPTION BY COUNTIES.** The Legislature of the State of Iowa has no power to authorize counties to become, as corporations, stockholders in Railroad Companies; and has never attempted, by the provisions of § 114 of the Code of 1851, or otherwise, to confer such power; overruling *Dubuque County v. The Dubuque and Pacific Railroad Company*, 4 G. Greene, 1; and approving *Stokes v. The County of Scott*, 10 Iowa, 166. *The State of Iowa, ex rel. The Burlington and Missouri River Railroad Company v. The County of Wapello*, 388.
3. **SAME: STATUTES CONSTRUED.** "An act regulating interest on city and county bonds," and "An act regulating the issue of county and corporate bonds," both of which were enacted on the 25th day of January, 1855, regulated the exercise of a power which it was supposed had been already granted; but neither of these can be construed as an original grant of power. *Id.*
4. **RAILROAD CORPORATION.** A railroad corporation in this State is a voluntary association, self-organized under a general incorporation act, and is invested with the privileges and franchises which belong to other joint stock companies. *Id.*

RECEIPT.

1. **SETTLEMENT OF ACCOUNTS: RECEIPT.** A receipt showing a settlement between the parties is *prima facie* evidence that they have adjusted all matters touching the business or adventure to which it relates; and until rebutted by showing that it was obtained by fraud, executed without proper knowledge of the facts, mistake or the like, is conclusive evidence of what it contains. And when the evidence supporting and impeaching such a receipt is balanced, the receipt must have its *prima facie* effect. *Levi v. Karrick et al.*, 344.

See ESTOPPEL, 1.

RECEIVER.

1. **RIGHTS OF THIRD PERSONS.** It is competent for a court of chancery, by an interlocutory order, to take possession of property which is the subject of litigation pending the proceedings; but when the rights of third persons, in no manner parties to the suit, and who have purchased in good faith, have intervened, such power should not be exercised. *Levi v. Karrick et al.*, 344.

RECORD.

1. **CORRECTION OF ERROR BY EVIDENCE ALIQUIDE.** Under § 3928 of the Revision of 1860, the District Court may hear evidence to explain a mistake in the record of a Justice of the Peace. *Brown v. Beesett*, 185.
2. **RECORD OF THE EVIDENCE.** A record purporting to set out the evidence heard in a cause on the trial below, but which is detached from the transcript, and is not certified as either a part or all of the evidence, will not be considered by the Supreme Court. *Vandall v. Vandall*, 247.
3. **INSTRUCTIONS A PART OF THE RECORD.** The Supreme Court will not review instructions which have not been made a part of the record, either by the signature of the Judge, as contemplated by §§ 4813 and 4814 of the Revision, or by being incorporated into a bill of exceptions. *The State of Iowa v. Gebhardt*, 473.

4. **EVIDENCE.** The Supreme Court will not reverse a cause upon the ground that the verdict below was not sustained by the evidence when all the evidence is not presented in the record. *Kienns v. Anderson, Garnishes*, 564.
5. **RECORD.** The Supreme Court will not consider errors assigned as to the ruling of the Court below on a bill of exceptions or motion which is not in the record. *Specht v. Schwer*, 605.

See NOTICE, 4; BILL OF EXCEPTIONS; INJUNCTIONS.

RECORDING ACT.

See MORTGAGE, 10; NOTICE.

REDEMPTION.

1. **CITY TAXES.** The owner of real estate sold for taxes is not required to pay to the purchaser, in order to redeem, the subsequent taxes for city purposes paid thereon by such purchaser: following *Byington v. Rider*, 9 Iowa, 566. *Byington v. Hampton et al.*, 23.
2. **ACCEPTANCE.** An acceptance by the purchaser of the amount paid by the owner of real estate sold for taxes, to the Treasurer for the purpose of redeeming the same, operates as a ratification of the act of the Treasurer in issuing a certificate of redemption. *Id.*
3. **REDEMPTION BY JUNIOR INCUMBRANCER.** Where the prayer of a petition filed by a junior incumbrancer prayed for leave to redeem the incumbered property from the lien of the senior mortgage, it was held that a decree ordering a sale of the property by a commissioner, and a further decree confirming the sale made by such commissioner to the junior incumbrancer, for a sum less than the amount of the mortgage debt, and ordering, that upon payment to the senior mortgagee of the sum bid for the property at the sale, the satisfaction of the senior mortgage should be entered upon the proper record, was erroneous. *White v. Hampton et al.*, 259.
4. **MORTGAGE REDEMPTION.** There is no redemption of mortgaged property after sale in foreclosure; and in a decree of foreclosure no particular words cutting off the equity of redemption are necessary. *Stoddard v. Forbes et al.*, 296; *Wagner v. Galyear et al.*, 598.
5. **REDEMPTION FROM JUDICIAL SALE.** A judgment debtor has the right to redeem property sold under execution, in all cases, except in the foreclosure of mortgages; and such right may be exercised by an assignee of such debtor to the same extent that it could be by the assignor. *Id.*
6. **RECHIVING REDEMPTION MONEY.** While neither a mortgagor nor his assignee has the right to redeem mortgaged premises after sale in foreclosure, if the mortgagee or purchaser accepts money tendered for the purpose of redeeming, and executes a receipt therefor, specifying that it is for that purpose, he will be estopped from denying such right. *Id.*
7. **SAME: EFFECT OF REDEMPTION.** A redemption of mortgaged premises after sale in foreclosure has the effect to restore the parties to the position which they occupied before the sale; the amount paid for the redemption being paid on the mortgage debt, and the mortgaged property remaining liable for any balance of such debt remaining unpaid. *Id.*

3. **MORTGAGE FORECLOSURE: NO REDEMPTION.** Under the Code of 1851 the mortgagor had no right to redeem after sale in foreclosure; following *Kramer v. Redman*, 9 Iowa, 114. *Wagner v. Gayyear et al*, 598.

REFEREE.

1. **ACQUIESCENCE.** The report of a referee should not be set aside on the ground that the reference was to but one person when it should have been to three, if it appears that no objection to such reference was made at the time, and that the party complaining appeared before the referee and submitted the cause on his part. *McShane v. Gray*, 504.
2. **REFEREE'S REPORT.** It is competent for the court to require the referee to state the facts found as the predicate for the final judgment; but in the absence of such requirement a general finding will be sufficient. *Id*.

See MASTER IN CHANCERY.

REPLEVIN.

1. **CAUSE OF ACTION.** To entitle the plaintiff in replevin to recover, it must appear that he was entitled to the possession of the property in controversy at the commencement of the action. *Alden & Co. v. Carver*, 253.
2. **DEFENSE IN REPLEVIN.** A defendant in replevin cannot defeat the action of the plaintiff by showing title in a third person not a party to the action. *WRIGHT, J.*, dissenting. *Reed v. Reed*, 5.
3. **PARTIES.** In an action of replevin to recover property taken by a sheriff under a writ of attachment, the executor of the plaintiff in the attachment suit is not a proper party. *Bevan v. Hayden*, 122.
4. **EVIDENCE.** In an action of replevin a bill of sale of personal property, executed by a third person and ratified by the plaintiff, is not admissible for the purpose of showing that plaintiff is not entitled to the possession, unless connected with evidence showing that the possession was transferred under such sale. *Id*.
5. **PLEADINGS AND EVIDENCE IN REPLEVIN.** Under the Code of 1851, evidence showing that the title of the plaintiff in an action of replevin, to the property in controversy, was acquired through a fraudulent sale was inadmissible when no allegation of fraud was set out in the pleadings. *Gray v. Earl et al*, 188.

See WITNESS.

REVIVOR.

See LUNK.

ROADS.

See BRIDGES.

SALE.

1. **SALE OF PERSONAL PROPERTY.** After a complete sale of personal property, the rights of the vendee cannot be prejudiced by the acts of

the vendor, when committed without the knowledge or consent of such vendee. *Gray v. Earl et al.*, 188.

See EXECUTION, 3; EXEMPTION, 3.

SCHOOLS.

1. **CONSTRUCTION OF SCHOOL LAW.** A board of directors of a school district may, under § 8, and the provision of § 1 of chapter 52, Laws of 1888, bind the corporation by contracts entered into after the election of their successors and before their qualification. *Dubuque Female College v. The District Township of The City of Dubuque*, 555.
2. **BOARD OF EDUCATION: CURATIVE ACT.** The Board of Education has power to legalize and confirm the acts of *de facto* officers acting under a school law and which has been declared invalid. *Id.*
3. **CORPORATION: RATIFICATION OF CONTRACT.** A school district may, through its officers, ratify or adopt any contract made by officers *de facto*, if the officer ratifying such unauthorized contract had authority to bind the corporation; and contracts made in the name of a corporation, before it has a legal existence, may be so ratified and adopted after it is incorporated. *Id.*

See CONSTITUTIONAL LAW, 2.

SCHOOL LANDS.

1. **SCHOOL LANDS: PRE-EMPTION.** A right to pre-empt school lands belonging to the 500,000 acre grant is not expressly given by the language of § 1070 of the Code of 1851; neither can such right be implied from the language employed therein. *Perrin v. Griffith et al.*, 151.

See CONSTITUTIONAL LAW, 2.

SCIRE FACIAS.

1. **JUDGMENT IN SCIRE FACIAS.** In scire facias no new judgment should be entered; but the court should order that the plaintiff have execution on the judgment described in the writ and for costs. *Denege v. Haun*, 240.

See COPARTNERSHIP, 6.

SERVICE OF NOTICE.

1. **WAIVER OF SERVICE OF NOTICE.** A waiver of service of notice, by an indorsement on the back thereof signed and dated as required by § 2816 of the Revision of 1860, is equivalent to an acknowledgment of service, and confers upon the court jurisdiction. *Johnson v. Monell*, 300.
2. **WHO MAY COMPLAIN WHEN DEFECTIVE.** A junior incumbrancer who is a co-defendant with the mortgagor in a foreclosure proceeding, cannot on appeal complain of a judgment against such mortgagor, on the ground that it was rendered without sufficient service of notice. *Sample v. Lee et al.* 304.
3. **WAIVER.** A defendant cannot after he has by his own act, or the act of his attorney, recognized the validity of a service of notice upon his agent, object to the jurisdiction of the Court. *Baker v. Kerr*, 354.

4. **SERVICE UPON AGENT.** Service of original notice upon the agent of defendant is not sufficient. *Brown v. Newman*, 546.

SET-OFF.

1. **SET-OFF: ASSIGNED NOTE.** In an action by the assignee of a note duly assigned, the defendant cannot, while the action thus stands, litigate a set-off against the assignor by simply averring that he is the real party in interest. *Lewis v. Denton*, 441.
2. **SAME: NO DEFENSE.** A set-off is not a defense—it is the defendant's cause of action against the plaintiff. *Id.*

See PLEADINGS AT LAW, 2; PROMISSORY NOTE, 6.

SETTLEMENT.

See DECREE, 4; RECEIPT.

SHERIFF'S SALE.

1. **SALE IN PARCELS.** When the sheriff sold a tract of land as one parcel, when it was susceptible of sale in several parcels, it was held that the sale should be set aside. *Bradford v. Limpus*, 424.

SLANDER.

1. **INSTRUCTION.** Instruction in slander considered. *Karney v. Paisley*, 89.

See EVIDENCE, 3.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE.** As a general rule, a party claiming a specific performance of a contract for the sale of real estate, must show his full compliance with all the terms of the contract, and is required to both aver and prove a demand of the deed, and a payment or tender of the money before suit brought. *Vennum v. Babcock et al.*, 194.

See CONSTRUCTION, 1; MORTGAGE, 14; STATUTES.

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" 1248-1251. Homestead. <i>Larson v. Reynolds & Packard</i> ,	587	" 1924. Homestead. <i>Pelan v. De Bevard</i> ,	56
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- An act to repeal section 945 of chapter 81 of the Code of Civil Practice. Attorney's Fees. *Blake v. Blake*,..... 43

STEAMBOATS.

1. CONFLICT OF LAWS. The sale of a steamboat under the statute laws of Illinois does not discharge such boats from liens which have attached
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under the laws of this state. Following *Haight Bros. & Co. v. The Steamboat Henrietta*, 4 Iowa, 472. *Oyden v. Oyden*, 176.

2. **MARITIME LAW.** The maritime law, as administered in courts of admiralty, does not apply to this class of cases. *Id.*
2. **JUDGMENT AGAINST A BOAT: BOND.** In an action against a steamboat, a judgment may be rendered against the boat and the sureties upon the bond upon which such boat was discharged from levy. Following *White v. Tiedale et al.*, 12 Iowa, 75. *Id.*

STREET.

See DUBUQUE.

SUPPLEMENTAL PROCEEDINGS.

1. **JUDGMENT: SUPPLEMENTAL PROCEEDINGS.** An order that an execution shall issue against a corporation with a clause inserted therein directing that it shall be levied upon the property of certain stockholders, does not render such stockholders judgment debtors "within the meaning of chapter 126 of the Revision of 1860," and they cannot be compelled, after the return of such execution, to disclose property in the summary manner provided by said chapter. *Bailey v. The Dubuque Western Railroad Company*, 97.

SUPREME COURT.

1. **OBJECTION SHOULD BE MADE BELOW.** An objection to the form of an interrogatory addressed to a witness, which was not presented to the court below, will not be considered by the Supreme Court. *Samuels v. Griffith et al.*, 108. See also *Keanan v. The Dubuque Mutual Fire Insurance Company*, 375.
2. **REVISION CONSTRUED: OPINIONS OF THE SUPREME COURT.** The Revision of 1860, §§ 2636, 3547 and 3550, construed and explained. *Baker v. Kerr*, 384.

See APPEAL; PRACTICE, 3.

SURETY.

1. **NOVATION: DISCHARGE OF SURETY.** The novation of a debt without the knowledge of a surety discharges the liability of such surety. *Gower v. Holloway*, 154.

TAXES.

1. **REVENUE: CASE FOLLOWED:** *Morford v. Unger*, 8 Iowa, 82, as to the power of a city to tax agricultural lands, re-affirmed. *Langworthy v. The City of Dubuque*, 86.
2. **SAME: ESTOPPEL.** Mere submission on the part of the citizen, except in extreme cases, to an illegal levy of taxes, will not be construed into a recognition of the right to the extent of estopping him from subsequently denying it. *Id.*

See REDEMPTION, 1, 2.

TAX TITLE.

See EVIDENCE, 1; PLEADINGS AT LAW; PRACTICE, 1; REDEMPTION, 1, 2.

TENANCY.

1. **TENANCY AT WILL.** Where a tenant at will erected buildings upon unoccupied lots, after which the notice required by statute to terminate such tenancy was served, but the tenant continued in possession for a series of years, by the sufferance of, and without any interference by, the landlord; it was held that the service of notice did not change the relation of the parties—that the lessee continued a tenant at will. *Newell v. Sanford*, 191.
2. **SAME: RENT.** When a tenancy is without stipulation as to the amount of rent reserved, the landlord may recover a reasonable compensation for the use and occupation of the premises. *Id.*

TENDER.

TITLE.

1. **LEGAL AND EQUITABLE TITLE.** In an action of right the legal title will prevail against an equitable one. *Allyn v. Johnson*, 604.

See EQUITY, 7.

TRESPASS.

1. **WILLFUL TRESPASS: EVIDENCE.** In the trial of an indictment for willful trespass in cutting down and destroying timber, evidence of the value of the timber destroyed is admissible. *The State of Iowa v. Watrous*, 489.

See EVIDENCE, 11; INDICTMENT, 1, 2.

TRUSTEE.

1. **REFUSAL OF TRUSTEE TO ACT.** A trust will not fail because a trustee refuses to act; neither will the beneficiary, in a court of equity, lose his interest in an estate by the disclaimer or refusal of the trustees to accept the trust. *White v. Hampton et al.*, 259. ✓
2. **RESULTING TRUST.** When land is purchased by one party with money furnished by another, an implied or resulting trust arises, the purchaser becoming a trustee. *McLennan et al. v. Sullivan et al.*, 521.

See EQUITY, 5.

USURY.

1. **USURY: WHO MAY PLEAD.** The grantee of real estate cannot without the consent of the grantor, interpose a plea of usury to a proceeding to foreclose a mortgage executed by such grantor; following *Hollingsworth v. Swickard*, 10 Iowa, 385; *Frost v. Shaw*, *Id.*, 491; *Powell v. Hunt*, 11 *id.*, 491. *Perry v. Kearns*, 174.
2. **DECREE.** A decree ordering the reconveyance of land held under an absolute deed, as security for the payment of a note tainted with usury, should require as a condition precedent to such reconveyance, a payment of the sum actually found due the holder of the note. *Vennem v. Babcock et al.*, 194.

3. **PLEADING USURY.** Usury may be set up in an answer by allegations of facts showing that illegal interest has been contracted for, without being pleaded in express terms. *Kurz v. Holbrook et al.*, 562.
4. As to purging transactions of usury and novation of debt, see *Hurley v. Gilchrist*, 594.

See PROMISSORY NOTE, 5.

VENUE.

1. **CONDITIONAL CHANGE OF VENUE.** It was ordered that the venue of a cause be changed to a county named, "at the cost of the defendant on his application therefor." *Held*, That it was a conditional order, and that the court did not err in reinstating and trying the cause after defendant's failure to perfect the change. *Picketts v. Hawes*, 601.

VERDICT.

1. **VERDICT.** The words "as charged in the indictment," after the words in a verdict on a trial on information, "We the jury find the defendant guilty," are mere surplusage. *The State of Iowa v. McCombe*, 426.
2. **REFORMING VERDICT.** A verdict defective in form may be reformed by the court when the intention of the jury can be ascertained from data given in the verdict, or referred to in the pleadings; but the court can not supply an omission to name the amount of the finding by reference to evidence outside the record. *Fromme v. Jones*, 474.
3. **VERDICT AGAINST EVIDENCE.** When the verdict is manifestly not supported by the evidence, it is not only the right, but the duty, of the appellate court to interfere with the exercise of discretion by the court below in refusing a new trial. *Lodge v. Remor et al.*, 600.

WAIVER.

1. **PRACTICE: WAIVER.** A party cannot consent by his presence and silence to the action of the court and afterwards avail himself of an objection thereto which should have been made at the time. *Vandall v. Vandall*, 247.
2. **WAIVER BY APPEAL.** An appeal from the judgment of a Justice of the Peace in a criminal action is a waiver of irregularities in the trial below, the cause standing in the District Court for a trial *de novo* upon its merits. *The State of Iowa v. McCombe*, 426.

See DEFAULT; SERVICE OF NOTICE.

WAREHOUSEMAN.

See COMMON CARRIER.

WITNESS.

1. **COMPETENCY OF THE WIFE.** Under § 3983 of the Revision of 1860, the wife is not a competent witness to the husband; and her statements are inadmissible in evidence for the husband. *Karney v. Paisley*, 89.
2. **CONSTITUTIONAL LAW.** The Legislature has power, under § 4, art. 1, of the Constitution, to provide that a person interested in the event of a suit shall not be a competent witness therein. *Id.*

3. ADMINISTRATOR COMPETENT. In a proceeding in the Probate Court to enforce the payment of a claim against the estate of a decedent, the executor is a competent witness as to facts which occurred after the death of the deceased. Rev. of 1860, § 3980; *Romans v. Hays' Administrator*, 12 Iowa, 270. *Terhune v. Henry & Carmichael*, 99.
4. COMPETENCY. The plaintiff in an action of replevin against a sheriff to recover the possession of property taken in attachment, is not under § 3982 of the Revision of 1860, rendered incompetent as a witness by the death of the attachment plaintiff. *Bevan v. Hayden*, 122.

Ex. 1-1-1.

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